87-1329

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NUMBER —

STEPHEN L. BROWNING PETITIONER,

V.

CHEVRON U. S. A., INC.,
ET AL RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STEPHEN L. BROWNING
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131

QUESTIONS PRESENTED FOR REVIEW

1 - WHETHER A FEDERAL COURT HEARING A CASE BY VIRTUE OF ITS DIVERSITY OF CITIZENSHIP JURISDICTION MUST APPLY THE LAWS OF THE STATE IN WHICH THE CAUSE OF ACTION AROSE.

2 - WHETHER THE FAILURE OF A FEDERAL COURT, HEARING A CASE BY VIRTUE OF ITS DIVERSITY OF CITIZENSHIP JURISDICTION, TO APPLY STATE LAW IN THAT CASE CONSTITUTES A DENIAL OF DUE PROCESS OF LAW AND A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

PARTIES TO THIS ACTION:

PLAINTIFF/PETITIONER

STEPHEN L. BROWNING,

A CALIFORNIA RESIDENT

DEFENDANTS/RESPONDANTS

CHEVRON U.S.A., INC.,

A PENNSYLVANIA CORPORATION

GULF MINERAL RESOURCES CORPORATION,

A DELAWARE CORPORATION

CONSOLIDATION COAL COMPANY,

A PENNSYLVANIA CORPORATION

CONSOLIDATION COAL COMPANY

A DELAWARE CORPORATION

PITTSBURG & MIDWAY COAL MINING COMPANY,

A MISSOURI CORPORATION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

NUMBER:

STEPHEN L. BROWNING, PETITIONER

V.

CHEVRON U. S. A., INC., ET AL
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEPHEN L. BROWNING RESPECTFULLY PRAYS FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN THIS CASE.

OPINIONS BELOW

THE OPINION OF THE DISTRICT COURT (App. A infra P. 1A-41A) IS NOT REPORTED.

THE OPINION OF THE COURT OF APPEALS (App. B infra P. 49A - 52A) IS NOT REPORTED.

JURISDICTION

THE JUDGMENT OF THE COURT OF APPEALS (App. C P.49a - 52A) WAS ENTERED ON AUGUST 28, 1987. A PETITION FOR REHEARING THIS MATTER WAS DENIED ON OCTOBER 27, 1987. THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. 1254 (1).

CONSTITUIONAL PROVISION INVOLVED.

1. THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES IN RELEVANT PART: "NO PERSON SHALL .... BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW.

S T A T E M E N T

THIS CASE DEALS WITH THE ISSUE OF THE OWNERSHIP OF 320-PLUS ACRES OF FEE SIMPLE INTEREST IN REAL PROPERTY AND THE OWNERSHIP OF 2,000-PLUS ACRES OF COAL AND MINING RIGHTS--

ALL SITUATED IN EMERY COUNTY, UTAH. THROUGHOUT THIS LITIGATION THE INTERESTS HAVE BEEN CONSIDERED SEPARATELY BECAUSE THERE ARE FACTS AND LAW WHICH, IN SOME INSTANCES, ARE UNIQUE TO EACH CATEGORY. LIKEWISE THERE ARE SOME FACTS AND LAW WHICH ARE APPLICABLE TO BOTH CATEGORIES. FOR THE SAKE OF CONSISTENCY, AND THE SEVERAL ADVANTAGES TO BE DERIVED THEREFROM, THESE PROPERTY INTERESTS WILL BE SO CATEGORIZED HEREIN.

IRA RICHARDSON BROWNING (HEREINAFTER IRA BROWNING) IS THE GRANDFATHER OF PLAINTIFF/PETITIONER. IRA BROWNING GRADUATED FROM THE UNIVERSITY OF VIRGINIA. ABOUT 1905 IRA BECAME INVOLVED PROFESSIONALLY WITH PATRICK J. QUEALY, HEREINAFTER P. J. QUEALY) AND, THROUGH MR. QUEALY, THE KEMMERER COAL CO., INC. OF WYOMING. THE RELATIONSHIP LASTED UNTIL IRA DIED IN NOVEMBER 1926. DURING THOSE YEARS IRA WAS INVOLVED IN THE ACQUISITION OF APPROXIMATELY 15,000 ACRES

OF PROPERTY INTERESTS IN EMERY COUNTY, UTAH BY KEMMERER COAL -- AND SEVERAL THOUSAND ADDITIONAL ACRES IN ADJOINING COUNTIES.

IN 1909 IRA BROWNING INCORPORATED THE SAN RAFAEL FUEL CO. IN UTAH. SAN RAFAEL FUEL WAS A SUBSIDIARY OF KEMMERER COAL. THE LEGAL MATTERS INVOLVED IN THE INCORPORATION WERE HANDLED BY WILLIAM BRADLEY AND WILLIAM PISCHEL, WHO JOINTLY COMPRISED THE LAW FIRM OF BRADLEY AND PISCHEL OF SALT LAKE CITY. P. J. QUEALY WAS THE PRESIDENT OF SAN RAFAEL FUEL, ALSO VICE PRESIDENT AND GENERAL MANAGER OF KEMMERER COAL. IRA BROWNING WAS VICE PRESIDENT OF SAN RAFAEL FUEL. MESSRS BRADLEY AND PISCHEL SAT ON THE BOARD OF DIRECTORS OF SAN RAFAEL FUEL. A PORTION OF THE REAL PROPERTY INTERESTS ACQUIRED BY IRA BROWNING ON BEHALF OF KEMMERER COAL, WITH FUNDS PROVIDED BY KEMMERER COAL, WERE DEEDED TO SAN RAFAEL FUEL AND RECORDED APPROPRIATELY.

MARY IRENE BEEBE BROWNING (HEREINAFTER MAY BROWNING) WAS THE WIFE OF IRA BROWNING. THEY HAD ONE CHILD, A SON -- LEE BEEBE BROWNING (HEREINAFTER LEE BROWNING). MAY BROWNING DIED IN 1955.

MESSERS BRADLEY AND PISCHEL PROBATED THE ESTATE OF IRA BROWNING. THEY REMAINED ON THE BOARD OF DIRECTORS OF SAN RAFAEL FUEL UNTIL THE LATE 1930'S. THEY OFFERED LEGAL ADVICE AND OPINIONS ON SEVERAL QUESTIONS TO KEMMERER COAL AND SAN RAFAEL FUEL.

T. J. O'BRIEN SUCCEEDED P. J. QUEALY AS BOTH VICE PRESIDENT OF KEMMERER COAL AND PRESIDENT OF SAN RAFAEL FUEL WHEN MR. QUEALY DIED IN OCTOBER 1930.

LESTER M. PRATT (HEREINAFTER L. M. PRATT) STARTED WORKING FOR KEMMERER COAL ABOUT 1914. MR. PRATT ROSE THROUGH THE RANKS TO BECOME PRESIDENT OF KEMMERER COAL.

LEE BROWNING, PETITIONER'S FATHER, DIED IN 1970.

REASONS FOR GRANTING PETITION

THIS MATTER IS WITHIN THE FEDERAL JURISDICTION BECAUSE OF THE DIVERSITY OF CITIZENSHIP OF THE LITIGANTS. WHEN A CASE IS IN A FEDERAL COURT BY VIRTUE OF THE DIVERSITY OF CITIZENSHIP JURISDICTION THAT COURT MUST FOLLOW STATE LAW ON SUBSTANTIVE ISSUES. IN WALKER V. ARMCO STEEL CORPORATION, 446 U.S. 740 100 S. CT. 1978 (1980) THIS COURT RECITED A BRIEF SUMMARY OF THE "ERIE DOCTRINE". THE COURT STATED AT 744-745:

"THE QUESTION WHETHER STATE OR FEDERAL LAW SHOULD APPLY ON VARIOUS ISSUES ARISING IN AN ACTION BASED ON STATE LAW WHICH HAS BEEN BROUGHT IN FEDERAL COURT UNDER DIVERSITY OF CITIZENSHIP JURISDICTION HAS TROUBLED THE COURT FOR MANY YEARS. IN THE LANDMARK DECISION OF ERIE R. CO V. TOMPKINS, 304 U.S. 64, 58 S. CT. 817, 82 L. ED. 1188 (1938), WE OVERTURNED THE RULE EX-

PRESSED IN SWIFT V. TYSON 16 PET, 1, 10 L. ED. 865 (1842), THAT FEDERAL COURTS EXERCISING DIVERSITY JURISDICTION NEED NOT, IN MATTERS OF "GENERAL JURISPRUDENCE" APPLY THE NONSTATUTORY LAW OF THE STATE. THE COURT NOTED THAT "DIVERSITY OF CITIZENSHIP JURISDICTION WAS CONFERRED IN ORDER TO PREVENT APPREHENDED DISCRIMINATION IN STATE COURTS AGAINST THOSE NOT CITIZENS OF THE STATE," ERIE R. CO. V. TOMPKINS, SUPRA 304 U.S. AT 74, 58 S. CT. AT 820. THE DOCTRINE OF SWIFT V. TYSON HAD LED TO UNDESIRABLE RESULTS OF DISCRIMINATION IN FAVOR OF NONCITIZENS, PREVENTION OF UNIFORMITY IN THE ADMINISTRATION OF STATE LAW, AND FORUM SHOPPING 304 U.S. AT 74-75, 58 S. CT. AT 820-821. IN RESPONSE WE ESTABLISHED THE RULE THAT "EXCEPT IN MATTERS GOVERNED BY THE FEDERAL CONSTITUTION OR BY ACTS OF CONGRESS, THE LAW TO BE APPLIED IN ANY (DIVERSITY) CASE IS THE LAW OF THE STATE " ID AT 78, 58 S. CT. AT 822.

THE BODY OF UTAH LAW WHICH APPLIES TO THIS CASE IS DRAWN FROM UTAH STATUTES, UTAH CASE LAW, THE "COMMON LAW OF ENGLAND", AND THE RULES OF EQUITY. THE COMMON LAW WAS ADOPTED BY STATUTE, R.S.U. 1898 §2488 AND BY STATUTE IN EACH REVISION OR COMPILATION OF UTAH STATUTES TO THE PRESENT. THE CURRENT UTAH CODE CITATION IS 68-3-1. THERE IS A QUALIFICATION UPON THE ADOPTION OF THE COMMON LAW -- IT IS NOT APPLIED WHEN CONTRARY TO UTAH STATUTE OR NOT COMPATIBLE FOR WHAT (FOR LACK OF BETTER TERMINOLOGY) WE SHALL CALL THE UTAH LIFE-STYLE AND COLLECTIVE EXPERIENCE.

IN AFFIRMING THE DECISION OF THE DISTRICT COURT, THE COURT OF APPEALS STATED THAT IT DID SO FOR ESSENTIALLY THE SAME REASONS CITED BY THE DISTRICT COURT. (APP. C p 51A-52A). THE OPINION OF THE DISTRICT COURT, THEREFORE, MAY BE PROPERLY VIEWED AS EXPRESSING THE JUDICIAL

REASONING UTILIZED BY BOTH LOWER COURTS.

FEE ACREAGE

THE PUBLIC RECORD AND THE RECORD IN THIS CASE SHOW THAT IN 1914 IRA BROWNING OBTAINED TWO PATENTS FROM THE STATE OF UTAH WHICH COVERED THIS ACREAGE. THE PATENTS WERE ISSUED SOLELY IN THE NAME OF IRA R. BROWNING.

IN 1982, PETITIONER/PLAINTIFF DISCOVERED THAT THE FEE ACREAGE STOOD IN THE NAME OF HIS GRANDFATHER, IRA BROWNING, WHO HAD DIED IN 1926.

PETITIONER'S RESEARCH INTO LAND TITLES IN EMERY COUNTY, UTAH WAS NECESSITATED BY A MEETING WITH ONE BENNETT BERTOLI, A FORMER EMPLOYEE OF DEFENDANT CONSOLIDATION COAL. MR. BERTOLI TOLD PETITIONER THAT HIS COMPANY AND KEMMERER COAL WERE INVOLVED IN A JOINT VENTURE IN EMERY COUNTY, UTAH. MR. BERTOLI STATED THAT THERE WERE SOME "TITLE PROBLEMS" WITH THEIR VENTURE

AND ASKED PETITIONER/PLAINTIFF IF HE WAS AWARE OF ANY ACREAGE IN EMERY COUNTY, UTAH IN WHICH HE (PETITIONER) HAD ANY INTEREST. MR. BERTOLI REFUSED TO IDENTIFY THE PARCELS WHERE THE "TITLE PROBLEMS" EXISTED OR TO OFFER TO PURCHASE ANY INTEREST PETITIONER/PLAINTIFF HAD THEREIN. MR. BERTOLI INDICATED THAT IF PETITIONER/PLAINTIFF WOULD PREPARE A LIST OF ALL PROPERTIES WHERE HE THOUGHT HE HAD AN INTEREST A MEETING WOULD BE ARRANGED AND THAT CONSOLIDATION COAL AND KEMMERER WOULD ACQUIRE PETITIONER'S INTEREST IN THE LANDS WHICH SUITED THEIR NEEDS. FOLLOWING A REVIEW OF THE VOLUMINOUS SURVIVING RECORDS OF IRA BROWNING, PETITIONER BEGAN RESEARCHING TITLES IN EMERY COUNTY, UTAH, AS HIS AVAILABLE VACATION TIME ALLOWED. IN THE LATTER PART OF 1980 BENNETT BERTOLI LEFT THE EMPLOY OF CONSOLIDATION COAL AND PETITIONER WAS REFERRED TO CLARON SPENCER, WHO REPRESENTED KEMMERER.

PETITIONER FIRST MET MR. SPENCER IN 1976 WHEN MR. SPENCER CONTACTED PETITIONER AND REQUESTED THAT PETITIONER TRAVEL FROM BURBANK, CALIFORNIA TO SALT LAKE CITY, UTAH AT PETITIONER'S EXPENSE TO DISCUSS SOME UNSPECIFIED TITLE PROBLEMS. THE MEETING WAS SHORT AS MR. SPENCER STATED THE PROPERTY IN QUESTION WAS LOST IRRETRIEVABLY AND THAT THERE WAS NOTHING TO DISCUSS.

DURING HIS TITLE RESEARCH PETITIONER COMPILED THE LIST OF PROPERTIES IN WHICH HE FELT HE MIGHT HAVE AN INTEREST. IN 1982 PETITIONER MET IN SALT LAKE CITY WITH MR. COMET JOHN AND MR. CLARON SPENCER WHO, RESPECTIVELY, REPRESENTED CONSOLIDATION COAL AND KEMMERER COAL, FOR THE AGREED PURPOSE OF SETTLING THE VARIOUS CONTROVERSIES. PETITIONER WAS ASKED TO PREPARE A SETTLEMENT OFFER. THE OFFER WAS PREPARED AND SENT TO MR. JOHN SHORTLY FOLLOWING THE MEETING.

WHEN NO RESPONSE WAS FORTHCOMING ON THE

QUESTION OF SETTLEMENT PETITIONER REQUESTED THAT THE EMERY COUNTY RECORDER ABSTRACT THE DISTRIBUTION ORDER OF THE ESTATE OF IRA BROWNING TO ALL OF THE PROPERTIES INVOLVED IN THIS LITIGATION. THE DISTRIBUTION ORDER WAS ORIGINALLY RECORDED IN 1927 BUT WAS NOT ABSTRACTED TO THE PROPERTIES IN THIS LITIGATION BECAUSE THESE PROPERTIES WERE NOT INVENTORIED IN THE ESTATE. THE ORDER CONTAINED AN OMNIBUS CLAUSE AND WAS, THEREFORE, EFFECTIVE TO PASS ALL INTERESTS TITLED TO IRA BROWNING AT THE TIME OF HIS DEATH, TO MAY AND LEE BROWNING, STATUTORY HEIRS OF IRA BROWNING.

THE ESTATE OF IRA BROWNING WAS PROBATED BY THE LAW FIRM OF BRADLEY AND PISCHEL. MESSRS. BRADLEY AND PISCHEL OF THE LAW FIRM OF BRADLEY AND PISCHEL WERE ON THE BOARD OF DIRECTORS OF SAN RAFAEL FUEL, A KEMMERER SUBSIDIARY, AND SO REMAINED UNTIL ABOUT 1937. THE RELATIONSHIP

BETWEEN KEMMERER COAL AND BRADLEY & PISCHEL CERTAINLY OFFERS AT LEAST A PARTIAL EXPLANATION OF WHY THE BROWNINGS' COUNSEL, BRADLEY & PISCHEL, FAILED TO VIGOROUSLY INSIST THAT THE EMERY COUNTY RECORDED ABSTRACT THE ORDER DISTRIBUTING THE ESTATE OF IRA BROWNING TO THE PROPERTIES INVOLVED IN THIS ACTION, OR, TO SEEK TO QUIET THE COLLECTIVE TITLE IN THE BROWNINGS.

WHILE THE ORDER DISTRIBUTING THE ESTATE OF IRA BROWNING WAS NOT ABSTRACTED TO THE PROPERTIES IN THIS ACTION, IT WAS LISTED IN BOTH THE GRANTOR AND GRANTEE INDEXES AND WAS READILY DISCOVERABLE AND QUITE AVAILABLE TO ANYONE WISHING TO ENQUIRE ABOUT THE TITLES.

THE ORDER DETERMINING PETITIONER TO BE THE SOLE HEIR OF MAY BROWNING WAS RECORDED. THE ORDER IDENTIFIED THE PROPERTIES IN THIS ACTION AND WAS ABSTRACTED TO THEM.

THE ORDER DISTRIBUTING THE ESTATE OF LEE

BROWNING DID NOT INVENTORY ANY OF THE PROPERTIES IN THIS ACTION, BUT DID CONTAIN AN OMNIBUS CLAUSE. IT WAS, THEREFORE, EFFECTIVE TO CONVEY THE TITLES. PETITIONER WAS ALSO THE SOLE HEIR OF LEE BROWNING, HIS FATHER.

THUS, CLEAR LEGAL TITLE TO THE FEE ACREAGE WAS VESTED IN PETITIONER, AND PETITIONER HAS A CHAIN OF TITLE FROM THE PATENTEE, IRA BROWNING, TO HIMSELF.

IN 1965 KEMMERER COAL RECORDED A NOTICE OF CLAIM OF INTEREST TO THIS ACREAGE. THE FILING OF A NOTICE OF CLAIM OF INTEREST IS AUTHORIZED BY UTAH CODE 57-9-4. TITLE 57, CHAPTER 9 IS KNOWN AS THE "MARKETABLE RECORD TITLE ACT". THIS ACT WAS PASSED IN 1963 FOR "....THE LEGISLATIVE PURPOSE OF SIMPLIFYING AND FACILITATING LAND TITLE TRANSACTIONS BY ALLOWING PERSONS TO RELY ON A RECORD CHAIN OF TITLE AS DESCRIBED IN §57-9-1 OF THIS ACT..." UTAH CODE 57-9-9.

THE FILING OF A NOTICE OF CLAIM OF INTEREST IS ANALOGOUS TO A NOTICE OF LIS PENDENS, THE LATTER ANNOUNCING TO THE WORLD THAT A LITIGATION IS UNDERWAY WHICH CONCERNS THE TITLE TO THE INDICATED PROPERTY RIGHTS, WHEREAS THE FORMER ANNOUNCES THAT A RIGHT IS ASSERTED BUT DOES NOT INDICATE THE MATTER IS IN LITIGATION.

THE FILING OF A NOTICE OF CLAIM OF INTEREST DOES NOT GIVE RISE TO A RIGHT, NOR DOES IT PERPETUATE A RIGHT EXISTANT WHEN THE NOTICE IS RECORDED. UTAH CODE 57-9-7 READS IN RELEVANT PART, "NOTHING CONTAINED IN THIS ACT SHALL BE CONSTRUED TO EXTEND THE PERIOD FOR THE BRINGING OF AN ACTION OR FOR THE DOING OF ANY OTHER REQUIRED ACT UNDER ANY STATUTES OF LIMITATIONS."

THE PURPOSE OF THIS LITIGATION WAS TO ADJUDICATE THE CLAIM ASSERTED BY KEMMERER COAL IN 1965. THE LOWER COURTS RESOLVED TO IMPRESS A RESULTING TRUST UPON PETITIONER FOR THE BENE-

FIT OF DEFENDANTS WITH REGARD TO THIS FEE ACREAGE. (APP. A P. 35A). NO AUTHORITIES ARE CITED AS AUTHORIZING SUCH A FINDING IN THE FACTUAL CIRCUMSTANCE OF THIS CASE.

THE ERIE DOCTRINE REQUIRES THAT FEDERAL COURTS USE STATE LAW IN ADJUDICATING THE CASES HEARD BY VIRTUE OF THEIR DIVERSITY OF CITIZENSHIP JURISDICTION. IN THE CASE OF GUARANTY TRUST CO. OF NEW YORK V. YORK, 326 U.S. 99, THIS COURT SPECIFICALLY APPLIED THE ERIE DOCTRINE TO THE ISSUE OF THE BURDEN OF PROOF WHEN IT STATED AT 109 ..."WE HAVE HELD THAT IN DIVERSITY CASES THE FEDERAL COURTS MUST FOLLOW THE LAW OF THE STATE AS TO BURDEN OF PROOF, CITIES SERVICE OIL CO., V. DUNLAP, 308 U.S. 208, 60 S. CT. 201,....".

WHILE THE LOWER COURTS NEITHER SPECIFIED THE METHODOLOGY NOR THE AUTHORITIES UTILIZED IN MAKING THEIR DECISION, IT IS QUITE CLEAR

THAT, IN THE FACTUAL CIRCUMSTANCES OF THIS CASE, UTAH LAW REQUIRES THAT DEFENDANTS PROVE THAT THEY HAD A VALID, VIABLE CLAIM WHEN THIS LITIGATION WAS COMMENCED IN 1983. IN BABCOCK V. DANGERFIELD, 94 P. 2D 862, THE SUPREME COURT OF UTAH SPOKE TO THE QUESTION OF BURDEN OF PROOF AT 864 WHEREIN THAT COURT SAID "IN THE PRESENT CASE THE APPELLANT PROVED A CHAIN OF TITLE FROM THE PATENTEE TO HIMSELF. IT HAVING BEEN PROVED THAT TITLE WAS VESTED IN PLAINTIFF, SUCH CONDITION WOULD BE PRESUMED TO EXIST UNTIL THE CONTRARY BE SHOWN.".

IN THE ABSENCE OF ANY DOCUMENTATION STATING THE FACTS AND AUTHORITIES RELIED UPON BY THE LOWER COURTS IN MAKING THEIR RULING IT IS NECESSARY TO EXAMINE THE FACTS OF THIS CASE AND SEE IF THE FINDING OF THE LOWER COURTS IS SUPPORTABLE BY THE FACTS IN THIS CASE AND THE APPLICABLE BODY OF UTAH LAW.

THE FACTUAL CIRCUMSTANCES WHICH GIVE RISE TO A RESULTING TRUSTEE ARE EXAMINED BY AUSTIN WAKEMAN SCOTT IN HIS TREATISE SCOTT ON TRUSTS IN §404.1. THE 1967 EDITION READS IN RELEVANT PART: "THERE ARE THREE SITUATIONS IN WHICH THE TRUST WHICH ARISES IS PROPERLY CALLED A RESULTING TRUST: 1] WHERE AN EXPRESS TRUST FAILS IN WHOLE OR IN PART; 2] WHERE AN EXPRESS TRUST IS FULLY PERFORMED WITHOUT EXHAUSTING THE TRUST ESTATE; 3] WHERE PROPERTY IS PURCHASED AND THE PURCHASE PRICE IS PAID BY ONE PERSON AND AT HIS DIRECTION THE VENDOR CONVEYS THE PROPERTY TO ANOTHER PERSON.". THIS RULE OF EQUITY HAS NOT BEEN ALTERED BY CASE LAW OR STATUTE IN UTAH. IN DEFENDING AGAINST DEFENDANTS' CLAIM PETITIONER BEGAN HIS AFFIRMATIVE DEFENSE OF LACHES BY ASSERTING THAT UNDER UTAH LAW IRA BROWNING WAS A PURCHASE MONEY RESULTING TRUSTEE. THE LOWER COURTS SO RULED ON THIS ISSUE.

THE LOWER COURTS FAILED TO STATE WHAT FACTS AND AUTHORITIES WERE RELIED UPON IN DETERMINING THAT PETITIONER SHOULD BE CHARGED AS A RESULTING TRUSTEE. IT IS PETITIONER'S POSITION THAT THE CONTROLLING LAW STATED IN SCOTT ON TRUSTS §404.1 SHOWS THAT IN THE FACTUAL CIRCUMSTANCES OF THIS CASE PETITIONER CANNOT BE A RESULTING TRUSTEE.

IRA BROWNING DIED INTESTATE IN NOVEMBER, 1926. THE SPECIFICS OF THE PASSING OF LEGAL TITLE TO THE FEE INTERESTS TO MAY AND LEE BROWNING, THE STATUTORY HEIRS OF IRA BROWNING, IS PRESENTED IN SCOTT ON TRUSTS §104, WHICH IS ENTITLED "DEATH INTESTATE OF SOLE TRUSTEE". SECTION 104 OF THE 1987 EDITION READS IN RELEVANT PART, "AT COMMON LAW THE RULES GOVERNING THE DESCENT AND DISTRIBUTION OF PROPERTY OF THE OWNER WERE APPLIED TO PROPERTY HELD IN TRUST. IF A SOLE TRUSTEE DIED, REAL PROPERTY HELD BY

HIM IN TRUST PASSED TO HIS HEIR AND PERSONAL PROPERTY TO HIS PERSONAL REPRESENTATIVES. NEITHER THE HEIR NOR THE PERSONAL REPRESENTATIVES, HOWEVER, WERE AUTHORIZED TO ADMINISTER THE TRUST, UNLESS IT WAS OTHERWISE PROVIDED BY THE TERMS OF THE TRUST. THEY TOOK THE LEGAL TITLE TO THE PROPERTY AND HELD IT NOT AS EXPRESS TRUSTEES BUT AS CONSTRUCTIVE TRUSTEES." IN 1933 A NEW STATUTE WAS ADDED TO THE UTAH CODE AS 29-2-1. THIS SECTION IS STILL IN THE UTAH CODE TODAY AS 22-2-1. THIS SECTION TITLED "DEATH OF TRUSTEE, TRUST ESTATE VESTS IN SUCCESSOR" READS IN RELEVANT PART, "UPON THE DEATH OF A SOLE TRUSTEE OF AN EXPRESS TRUST THE TRUST ESTATE DOES NOT DESCEND TO HIS HEIRS OR PASS TO HIS PERSONAL REPRESENTATIVES, BUT SHALL BY VIRTUE HEREOF, UPON THE APPOINTMENT AND QUALIFICATION OF A SUCCESSOR TO SUCH TRUSTEE, BECOME IMMEDIATELY VESTED IN SUCH SUCCESSOR IN TRUST.".

THIS STATUTE PROVIDES AN EXCEPTION TO THE RULE STATED BY SCOTT IN §104 IN THE CASE OF AN EXPRESS TRUST. IRA BROWNING WAS A RESULTING TRUSTEE SO THIS EXCEPTION DOES NOT APPLY. HOWEVER, THE STATUTE DOES SHOW THAT UTAH LAW CONTEMPLATES THE RULE IN §104 AND ACCEPTS IT AS STATING THE NORMAL COURSE WITH REGARD TO THE DESCENT OF TITLE, AND THE TYPE OF TRUST RELATIONSHIP CREATED BY SUCH A PASSAGE OF TITLE.

KNOWLEDGE OF THE PASSAGE OF THE TITLES TO ALL THE INTERESTS INVOLVED IN THIS ACTION IS CHARGEABLE TO KEMMERER COAL AT LEAST AS EARLY AS 1931 UNDER UTAH LAW. IN 1931 AT THE MEETING OF THE BOARD OF DIRECTORS OF SAN RAFAEL FUEL CO. HELD SEPTEMBER 4, 1931, THE MINUTES READ IN RELEVANT PART AT PAGE 3, "THAT MAY B. BROWNING AND LEE B. BROWNING, SOLE DISTRIBUTEES OF THE ESTATE OF IRA R. BROWNING, DECEASED, SHALL JOIN IN EXECUTING SUCH WAIVER AS OWNERS OF COAL AND

COAL RIGHTS IN AND UNDERNEATH THE SURFACE OF THE FOLLOWING TRACT OF LAND..." FOLLOWING THIS EXCERPT IS A METES AND BOUNDS DESCRIPTION OF A PORTION OF ONE TRACT OF LAND LISTED ON ONE OF THE 3 QUIT-CLAIM DEEDS PASSED FROM IRA BROWNING TO P. J. QUEALY, TRUSTEE. THE COAL RIGHTS DESCRIBED IN THE MINUTES ARE NOT INVOLVED IN THIS LITIGATION BUT THE RECITATION IN THE MINUTES SHOWS THAT THOSE IN ATTENDANCE AT THE MEETING CLEARLY UNDERSTOOD THAT IRA BROWNING WAS DEAD AND THAT MAY AND LEE BROWNING SUCCEEDED TO ALL TITLES HELD BY HIM.

SAN RAFAEL FUEL CO. WAS A SUBSIDIARY OF KEMMERER COAL CO.. IN ATTENDANCE AT THIS MEETING WERE: WILLIAM BRADLEY AND WILLIAM PISCHEL (OF THE LAW FIRM OF BRADLEY & PISCHEL), LESTER M. PRATT (THE CORPORATE SECRETARY OF KEMMERER COAL), AND T. J. O'BRIEN (VICE PRESIDENT OF KEMMERER COAL). MESSRS. BRADLEY AND O'BRIEN

SIGNED THE MINUTES. PETITIONER CONTENDED IN THE LOWER COURTS THAT NOTICE OF THE CIRCUMSTANCES NOTED IN THE MINUTES TO TWO CORPORATE OFFICERS CONSTITUTED NOTICE TO THE CORPORATION. (THE LOWER COURTS FAILED TO RULE ON THIS POINT)

FROM 1927 THROUGH 1982 KEMMERER COAL RECEIVED TAX NOTICES FOR THE FEE PROPERTIES ADDRESSED TO: "IRA R. BROWNING, C/O KEMMERER COAL, FRONTIER, WYOMING", SO KEMMERER HAD ANNUAL REMINDERS OF WHO HELD THE LEGAL TITLES TO THE FEE ACREAGE. THEY ALSO KNEW THAT ALL INTERESTS HELD BY IRA BROWNING HAD PASSED, UPON HIS DEATH, TO MAY AND LEE BROWNING -- THE "... SOLE DISTRIBUTEES.." OF HIS ESTATE BY OPERATION OF LAW.

FOLLOWING THE SEPTEMBER 4, 1931 SAN RAFAEL FUEL BOARD MEETING THE LAW FIRM OF BRADLEY & PISCHEL SENT A LETTER TO L. M. PRATT, THE CORPORATE SECRETARY OF KEMMERER COAL WHICH FURTHER

DISCUSSES THE SUBJECT OF TITLES. THE LETTER, DATED SEPTEMBER 9, 1931, READS IN RELEVANT PART, "WE UNDERSTAND THAT MR. IRA R. BROWNING DID NOT IN HIS LIFETIME AND THAT MAY AND LEE BROWNING, AS SOLE DISTRIBUTEES OF HIS ESTATE, DO NOT NOW OWN THE EQUITABLE TITLE TO THE COAL RIGHTS UNDER THAT PARCEL. IN ORDER, THEREFORE, TO PROTECT THE TITLE OF THE EQUITABLE OWNER OF THE COAL RIGHTS MAY B. BROWNING AND LEE B. BROWNING HAVE GIVEN THE ENCLOSED DEED TO THE KEMMERER COAL CO. WHO, YOU ADVISE US, IS SUCH EQUITABLE OWNER." THE SITUATION WHEREIN THE LEGAL INTEREST AND EQUITABLE INTEREST ARE SEPARATED IS A TRUST. THUS, THIS LETTER SHOWS THAT KEMMERER COAL WAS AWARE THAT THE PROPERTIES HELD BY IRA BROWNING AS A TRUSTEE PASSED TO HIS HEIRS WHO WERE ALSO CHARGEABLE AS TRUSTEES. THE LETTER ALSO DISCUSSES THE ISSUE OF WHO MUST PASS A VIABLE DEED FOLLOWING THE DEVOLUTION OF TITLE FROM IRA R.

BROWNING TO HIS HEIRS. THE LETTER READS IN RELEVANT PART, "WE ENCLOSE HEREWITH DULY EXECUTED QUITCLAIM DEED FROM MAY B. BROWNING AND LEE B. BROWNING TO THE KEMMERER COAL CO. FOR A PARCEL OF LAND IN EMERY COUNTY, UTAH....THE ENCLOSED DEED OF OCTOBER 31, 1924, FROM IRA BROWNING AND HIS WIFE TO P. J. QUEALY FOR THE SAME PARCEL OF LAND, WHICH YOU LEFT WITH US WHEN YOU CALLED ON THE 4TH INST., IS NOW OF NO FURTHER USE, ACCORDING TO OUR UNDERSTANDING." (EMPHASIS ADDED)

THESE FACTS WERE CITED BY PLAINTIFF/PETITIONER IN THE LOWER COURTS AS BEING SUFFICIENT TO FIND THAT THE DEVOLUTION OF THE COLLECTIVE TITLE TO THE FEE ACREAGE FROM IRA BROWNING TO HIS HEIRS WAS FULLY BINDING UPON KEMMERER COAL BY VIRTUE OF THE UTAH RECORDING STATUTES, THE RELEVANT SECTION OF WHICH APPEARED AS §4875 COMPILED LAWS OF UTAH 1917

AND IS TODAY UTAH CODE 57-1-6. THIS STATUTE READS IN PART, "...EVERY INSTRUMENT OF WRITING ...WHEREBY ANY REAL ESTATE MAY BE AFFECTED, TO OPERATE AS NOTICE TO THIRD PERSONS, SHALL BE PROVED OR ACKNOWLEDGED AND CERTIFIED IN THE MANNER PRESCRIBED BY THIS TITLE AND RECORDED IN THE OFFICE OF THE RECORDER OF THE COUNTY IN WHICH SUCH REAL ESTATE IS SITUATED, BUT SHALL BE VALID AND BINDING BETWEEN THE PARTIES WITHOUT SUCH PROOF, ACKNOWLEDGMENT, CERTIFICATION, OR RECORD, AND TO ALL PERSONS WHO HAVE HAD ACTUAL NOTICE.". IN 1890 THE UTAH SUPREME COURT DEFINED "ACTUAL NOTICE" IN TOLAND V. COREY 24 P190 (AFFIRMED 154 U.S. 499) AT PAGE 191 WHEREIN THE COURT STATED, "OUR STATUTE REQUIRES ACTUAL NOTICE, AND CONSTRUCTIVE NOTICE IS NOT SUFFICIENT. THE DEMANDS OF THE STATUTE ARE ANSWERED IF A PARTY DEALING WITH THE LAND HAS INFORMATION OF A FACT OR FACTS THAT WOULD PUT

A PRUDENT MAN UPON INQUIRY, AND WHICH WOULD, IF PURSUED, LEAD TO ACTUAL KNOWLEDGE OF THE STATE OF THE TITLE; AND THIS IS ACTUAL NOTICE.". "ACTUAL NOTICE" DOES NOT REQUIRE THAT THE ENQUIRY ACTUALLY BE CONDUCTED. THE PARTY WHO HAS HAD "ACTUAL NOTICE" IS CHARGEABLE WITH THE INFORMATION AND KNOWLEDGE WHICH THE ENQUIRY WOULD HAVE REVEALED -- WHETHER OR NOT THE ENQUIRY WAS ACTUALLY CONDUCTED. THUS, SLOTH IS NOT A DEFENSE AGAINST "ACTUAL NOTICE". THE INEVITABLE CONCLUSION OF LAW BEING: KEMMERER COAL HAD "ACTUAL NOTICE" AND THE TITLES OF MAY AND LEE BROWNING WERE FULLY EFFECTIVE UPON KEMMERER COAL CO..

THE LOWER COURTS FAILED TO MAKE A HOLDING AS TO WHETHER KEMMERER COAL HAD "ACTUAL NOTICE" AND WHETHER PASSAGE OF THE LEGAL TITLES TO MAY AND LEE BROWNING WERE BINDING UPON KEMMERER COAL BECAUSE OF THEIR "ACTUAL NOTICE".

SECTION 104 OF SCOTT ON TRUSTS, WHICH HAS NOT BEEN SUPPLANTED OR MODIFIED BY STATUTE OR CASE LAW IN UTAH, PROVIDES THAT, IN THE FACTUAL CIRCUMSTANCES OF THIS CASE, WHEN MAY AND LEE BROWNING TOOK TITLE TO THESE PROPERTY INTERESTS THEY DID SO AS CONSTRUCTIVE TRUSTEES. A CONSTRUCTIVE TRUST IS DEFINED IN RESTATEMENT - RESTITUTION §160 AS "WHERE A PERSON HOLDING TITLE TO PROPERTY IS SUBJECT TO AN EQUITABLE DUTY TO CONVEY IT TO ANOTHER ON THE GROUND THAT HE WOULD BE UNJUSTLY ENRICHED IF HE WERE PERMITTED TO RETAIN IT, A CONSTRUCTIVE TRUST ARISES.". THIS REFLECTS APPLICABLE UTAH LAW. SCOTT IN §462 OF SCOTT ON TRUSTS SPEAKS FURTHER TO THE SUBJECT OF CONSTRUCTIVE TRUSTS AT VOL. V PAGE 3413 OF THE 1967 EDITION WHICH READS IN RELEVANT PART "WHEN A PERSON HOLDS THE TITLE TO PROPERTY WHICH HE IS UNDER AN OBLIGATION TO CONVEY TO ANOTHER, AND WHEN THAT OBLIGATION

DOES NOT ARISE MERELY BECAUSE HE HAS VOLUNTARILY ASSUMED IT, HE IS SAID TO HOLD THE PROPERTY ON A CONSTRUCTIVE TRUST FOR THE OTHER AND HE IS CALLED A CONSTRUCTIVE TRUSTEE OF THE PROPERTY.". PETITIONER CONTENDED THAT MAY AND LEE BROWNING WERE CHARGEABLE AS "CONSTRUCTIVE TRUSTEES" OF ALL THE PROPERTY INTERESTS INVOLVED IN THIS ACTION. THE LOWER COURTS FAILED TO RULE ON THIS ISSUE.

A CONSTRUCTIVE TRUST IS A WINDOW OF OPPORTUNITY PROVIDED BY EQUITY TO A PARTY TO OBTAIN THAT WHICH IS EQUITABLY HIS WHICH HAS, SOMEHOW, BEEN LOST. THIS WINDOW IS NOT LEFT OPEN IN PERPETUITY. IT IS CLOSED BY THE DOCTRINE OF LACHES. SCOTT ON TRUSTS §409 SPEAKS TO THE ISSUE OF LACHES CLOSING THE WINDOW AFFORDED BY A CONSTRUCTIVE TRUST. AT PAGES 3224-3225 OF VOL. V THIS SECTION READS "IN THE CASE OF A CONSTRUCTIVE TRUST THE BENEFICIARY MAY BE PRECLUDED FROM

ENFORCING THE TRUST BY HIS LACHES EVEN THOUGH THE TRUSTEE HAS NOT REPUDIATED THE TRUST.". SECTION 481.1, VOL. V AT PAGES 3464-3465 READS IN RELEVANT PART "...A CONSTRUCTIVE TRUSTEE ORDINARILY HOLDS THE PROPERTY ADVERSELY TO THE BENEFICIARY, AND IF THE BENEFICIARY KNOWS OF THE CIRCUMSTANCES GIVING RISE TO THE CONSTRUCTIVE TRUST, HE MAY BE BARRED BY LACHES IF HE FAILS TO SUE WITHIN A REASONABLE TIME. ...THE BENEFICIARY WILL NORMALLY BE BARRED BY LACHES IF HE KNOWS OR OUGHT TO KNOW OF THE CIRCUMSTANCES AND FAILS TO SUE WITHIN A REASONABLE TIME. ORDINARILY HE WILL BE BARRED AFTER THE LAPSE OF THE PERIOD FIXED BY THE STATUTE OF LIMITATIONS FOR ACTIONS AT LAW IN ANALOGOUS CASES.".

PETITIONER ARGUED IN THE LOWER COURTS THAT KEMMERER COAL WAS CHARGEABLE WITH "ACTUAL NOTICE" AT LEAST AS EARLY AS 1931. IT WAS PETITIONER'S CONTENTION THAT AT THIS POINT, WHERE

KEMMERER COAL HAD "ACTUAL NOTICE" OF THE CIRCUMSTANCES GIVING RISE TO THE CONSTRUCTIVE TRUST, THE STATUTORY PERIOD FOR THE CLOSING OF THE WINDOW OF OPPORTUNITY BY LACHES BEGAN TO RUN. THE LONGEST PERIOD ALLOWED, BY STATUTE, IN UTAH BEFORE ANY ACTIONS REGARDING REAL ESTATE ARE BARRED IS SEVEN YEARS, COMPILED LAWS OF UTAH 1917, §6446, §6450. PETITIONER'S AFFIRMATIVE DEFENSE IS THAT KEMMERER/GULF/CHEVRON WAS GUILTY OF LACHES WITH REGARD TO ENFORCING ANY CLAIM THEY HAD OR MIGHT HAVE HAD IN AND TO THE FEE ACREAGE LONG BEFORE THIS ACTION WAS FILED, IN 1983 BY PLAINTIFF/PETITIONER, BY THE APPLICATION OF THE APPROPRIATE LAWS OF THE STATE OF UTAH TO THE FACTS OF THIS CASE. THE LOWER COURTS PRONOUNCED THAT KEMMERER/GULF/CHEVRON WAS NOT GUILTY OF LACHES (APP. A P. 40-A) WITHOUT CITING ANY BASIS IN FACT AND LAW FOR SUCH FINDING.

THE DICTUM OF BABCOCK V DANGERFIELD, CITED

SUPRA, REQUIRES THAT DEFENDANTS/RESPONDANTS ASSUME THE BURDEN OF PROVING THEIR CLAIM UPON THE FEE ACREAGE. THE LOWER COURTS FAILED TO STATE THE BASIS OF THE CLAIM OF KEMMERER/GULF/CHEVRON -- AS DID KEMMERER/GULF/CHEVRON. THE LOWER COURTS ALSO FAILED TO STATE THE FACTS AND LAWS WHICH, PRESUMABLY, THE DEFENDANTS/RESPONDANTS SHOWED TO PROVE THEIR CLAIM.

THE DECISION OF THE LOWER COURTS TO IMPRESS A RESULTING TRUST UPON PETITIONER OF THE FEE ACREAGE IS WHOLLY INCONSISTENT WITH THE PROPERLY APPLICABLE LAWS OF THE STATE OF UTAH REGARDING THE CREATION OF RESULTING TRUSTS.

COAL AND MINING RIGHTS

THE COAL AND MINING RIGHTS INVOLVED IN THIS LITIGATION WERE PURCHASED BY IRA BROWNING BETWEEN 1907 AND 1908.

WHILE NO DOCUMENT SURVIVES WHICH SPECIFICALLY IDENTIFIES THE SEVERED COAL AND MINING

RIGHTS WHICH IRA BROWNING PURCHASED WITH THE FUNDS OF KEMMERER COAL, THERE IS A DISCUSSION OF THE PROPERTIES PURCHASED BY IRA BROWNING WITH KEMMERER COAL FUNDS IN THE MINUTES OF A MEETING HELD IN THE NEW YORK CITY OFFICE OF KEMMERER COAL. THESE MINUTES READ IN RELEVANT PART AT PAGE 2 "THE GENERAL MANAGER FURTHER REPORTS THE PURCHASE OF COAL RIGHTS ... IN UTAH, EMERY COUNTY, NEAR THE TOWN OF EMERY ... GENERAL MANAGER ALSO STATES THAT MR. IRA BROWNING WHO HAS REPRESENTED THIS COMPANY IN THE ACQUISITION OF THESE LANDS ... THE DEEDS HAVE BEEN MADE TO MR. BROWNING FOR THIS PROPERTY AND MR. QUEALY HAS AN UNDERSTANDING WITH HIM THAT THEY ARE TO BE TRANSFERRED TO P. J. QUEALY, TRUSTEE.". THE PROPERTIES INVOLVED IN THIS LITIGATION WERE INDEED LISTED IN 3 QUIT-CLAIM DEEDS TO "P. J. QUEALY, TRUSTEE" IN 1912. THE FACT THAT THESE ARE THE ONLY COAL AND MINING

RIGHTS WHOSE HISTORICAL CIRCUMSTANCES CORRESPOND TO THE 1908 MINUTES INDICATES THAT THESE COAL AND MINING RIGHTS ARE THOSE REFERRED TO IN THOSE MINUTES. THERE IS NO OTHER POSSIBILITY.

IRA BROWNING WAS A PURCHASE-MONEY RESULTING TRUSTEE PURSUANT TO THE PROVISION OF SCOTT ON TRUSTS §404.1 DISCUSSED PREVIOUSLY WITH REGARD TO THE FEE ACREAGE. THE LOWER COURTS FAILED TO MAKE A HOLDING WITH REGARD TO THE COAL AND MINING RIGHTS -- AS THEY FAILED TO APPLY THE PROPER UTAH LAW TO THE FACTS AND MAKE A FINDING WITH REGARD TO THE FEE ACREAGE.

IRA BROWNING COMPLIED WITH THE VERBAL UNDERSTANDING HE HAD WITH MR. QUEALY WHEN HE PASSED THE 3 DEEDS IN 1912. THE LOWER COURTS APPEAR TO HAVE TOTALLY FAILED TO APPREHEND THE FACT THAT, ALTHOUGH MR. QUEALY WAS A MEMBER OF THE BOARD OF TRUSTEES OF KEMMERER COAL AND A

MAJOR STOCKHOLDER THEREOF, THE MONEY TO PROCURE THESE COAL AND MINING RIGHTS WAS PROVIDED BY KEMMERER COAL -- A WYOMING CORPORATION -- A SEPARATE LEGAL ENTITY. THUS, MR. QUEALY WAS THE CHOSEN SUCCESSOR TRUSTEE TO IRA BROWNING WITH REGARD TO THE COAL AND MINING RIGHTS.

THE 3 DEEDS PASSED BY IRA BROWNING TO MR. QUEALY WERE NOT RECORDED AT THE TIME MR. BROWNING DIED IN NOVEMBER, 1926. THUS, LEGAL TITLE STOOD IN IRA BROWNING'S NAME AT THE TIME OF HIS DEATH.

THE 3 QUIT-CLAIM DEEDS PASSED TO P. J. QUEALY BY IRA BROWNING IN 1912 WERE RECORDED IN 1949. THE RECORDATION OF THESE DEEDS WAS PART OF THE CHAIN BY WHICH KEMMERER COAL CAME TO HOLD LEGAL TITLE TO THE COAL AND MINING RIGHTS. IT IS PLAINTIFF/PETITIONER'S POSITION THAT KEMMERER LOST ANY RIGHT THEY ONCE HAD OR MIGHT HAVE HAD IN AND TO THE COAL AND MINING RIGHTS

BECAUSE OF LACHES BEFORE 1949, AND THAT THE FACTS RELEVANT TO THE CHAIN OF TITLE TO THESE INTERESTS MADE KEMMERER/GULF/CHEVRON CHARGEABLE BY PETITIONER AS CONSTRUCTIVE TRUSTEES.

THE LOWER COURTS WERE ASKED TO CHOOSE WHICH CHAIN OF TITLE TO THE COAL AND MINING RIGHTS WAS CORRECT -- THAT PROPOSED BY PLAINTIFF/PETITIONER OR THAT IMPLICITY PRESENTED BY DEFENDANTS. WHILE THE OPINION IN THIS CASE PEREGRINATES RANDOMLY THROUGH THE FACTS RELEVANT TO THE ISSUE OF CHAIN-OF-TITLE, IT FAILS TO STATE ANY CONCLUSIONS OF LAW BASED THEREUPON.

IT IS THE POSITION OF PLAINTIFF/PETITIONER THAT THE CIRCUMSTANCES WHICH CONSTITUTE "ACTUAL NOTICE" FOR THE PURPOSE OF HOLDING KEMMERER COAL TO BE BOUND TO RECOGNIZE THE TITLES HELD BY MAY AND LEE BROWNING TO THE FEE ACREAGE ARE OPERATIONAL AS "ACTUAL NOTICE" WITH REGARD TO THE COAL AND MINING RIGHTS AS WELL.

IT IS QUITE CLEAR THAT THE SEPTEMBER 9, 1931 LETTER FROM BRADLEY & PISCHEL INFORMED KEMMERER COAL THAT, BECAUSE OF THE DEVOLUTION OF TITLE FROM IRA BROWNING TO MAY AND LEE BROWNING, ANY DEEDS INTENDED TO CONVEY TITLE TO THESE PROPERTIES HAD TO COME FROM MAY AND LEE BROWNING. OBVIOUSLY MESSRS. BRADLEY & PISCHEL FELT THAT THE STATUTORY PROVISION STATED AT §4875 COMPILED LAWS OF UTAH 1917 WAS APPLICABLE TO KEMMERER COAL.

THE POINTS AND AUTHORITIES WHICH PLAINTIFF/PETITIONER CITED AS SUPPORTING HIS POSITION THAT KEMMERER COAL WAS GUILTY OF LACHES BY 1938 WITH REGARD TO THE FEE ACREAGE ARE APPLICABLE TO THE COAL AND MINING RIGHTS AS WELL, AND SUPPORTS THE SAME CONCLUSION OF LAW.

IN 1949 A CHAIN OF EVENTS WAS BEGUN WHICH RESULTED IN THE CHAIN OF TITLE WHICH DEFENDANTS IMPLICITY ARGUED VESTED TITLE IN THEM. PLAIN-

TIFF ARGUED THAT THIS CHAIN RESULTS IN A "WILD TITLE" AS IT DOES NOT LINK WITH THE CHAIN OF TITLE WHICH IS BINDING UPON KEMMERER. THE CHAIN PROPOSED BY DEFENDANTS DOES NOT HAVE A LINK FROM MAY AND LEE BROWNING, AS KEMMERER KNEW IT MUST. THE CHAIN OF TITLE PROPOSED BY DEFENDANTS DOES NOT DEAL WITH THE FACT THAT IRA BROWNING WAS A TRUSTEE EITHER. THE CHAIN PROPOSED BY PETITIONER/PLAINTIFF DOES LINK WITH MAY AND LEE BROWNING AND DOES DEAL WITH THE TRUSTEESHIP OF IRA BROWNING.

A SUPPLEMENTAL PROBATE OF THE ESTATE OF P. J. QUEALY WAS HELD IN RICHFIELD, SEVIER COUNTY, UTAH.

ON MARCH 21, 1949, THE JUDGE SIGNED AN ORDER DISTRIBUTING ALL OF THE PROPERTY RIGHTS TO SUSIE J. QUEALY, THE WIFE AND SOLE TESTAMENTARY HEIR OF P. J. QUEALY. THIS ORDER WAS RECORDED IN EMERY COUNTY ON JUNE 2, 1949.

ON MARCH 14, 1949 SUSIE J. QUEALY PASSED A WARRANTY DEED TO L. M. PRATT CONVEYING THE COAL AND MINING RIGHTS TO HIM. THIS DEED WAS RECORDED IN EMERY COUNTY ON JUNE 22, 1949.

ON JUNE 21, 1949 THE 3 QUIT-CLAIM DEEDS FROM IRA BROWNING TO "P. J. QUEALY, TRUSTEE" WERE RECORDED.

ON JUNE 22, 1949 L. M. PRATT PASSED A "SPECIAL WARRANTY DEED" TO KEMMERER COAL CO. CONVEYING THE COAL AND MINING RIGHTS TO KEMMERER. THIS DEED WAS RECORDED MARCH 4, 1954.

THIS IS THE SAME "L. M. PRATT" WHO ATTENDED THE SAN RAFAEL FUEL CO. BOARD OF DIRECTORS MEETING ON SEPTEMBER 4, 1931. HE IS THE L. M. PRATT TO WHOM THE SEPTEMBER 9, 1931 LETTER FROM BRADLEY & PISCHEL WAS ADDRESSED. IN 1949 L. M. PRATT WAS THE PRESIDENT OF KEMMERER COAL.

WHILE SUSIE QUEALY CONVEYED THE COAL AND MINING RIGHTS TO MR. PRATT WITH A WARRANTY DEED,

MR. PRATT CONVEYED THE INTERESTS TO KEMMERER WITH A "SPECIAL WARRANTY DEED". INDEED, THE CONVEYANCE USED BY PRATT MIGHT BE MORE PROPERLY CATEGORIZED AS A "LIMITED WARRANTY DEED". ON PAGE 2 THIS DEED RECITES "GRANTORS WARRANT ONLY AS AGAINST THEIR OWN ACTS AND OMISSIONS AND AS TO THE CLAIMS OF ALL PERSONS CLAIMING BY, THROUGH OR UNDER THEM.". THIS LIMITATION MOST CERTAINLY APPEARS TO BE DESIGNED TO INSULATE MR. PRATT AND HIS WIFE FROM ANY FINANCIAL PROBLEMS RESULTING FROM THIS TITLE TRANSACTION. THE INESCAPABLE CONCLUSION IS THAT MR. PRATT HAD, AT THE VERY LEAST, SOME RESERVATIONS ABOUT THE CIRCUMSTANCES OF THIS CONVEYANCE. MR. PRATT IS CLEARLY A THREAD OF CONTINUITY AT KEMMERER COAL RUNNING FROM BEFORE THE DEVELOPMENT OF THIS CONTROVERSY THROUGH THE POINT IN TIME WHERE KEMMERER COAL CAME TO HOLD THE LEGAL TITLE TO PROPERTY INTERESTS TO WHICH THEY HAD PREVIOUSLY

LOST ALL RIGHTS BECAUSE OF THEIR FAILURE TO ASSERT THEIR RIGHTS. MR. PRATT WAS INVOLVED IN ALL OF IT.

THE LOWER COURTS PROPOSE TO AVOID CONSIDERATION OF THE ARGUMENT PUT FORTH BY PETITIONER/PLAINTIFF BY CITING THE CASE IN RE ESTATE OF SHARP, 537 P. 2ND 1034. THE COURTS NEGLECT TO SHOW WHY SHARP IS APPLICABLE TO THIS CASE -- NO SPECIFIC QUOTATION AND NO PAGE CITATION IS GIVEN.

SHARP IS IN NO WAY PARALLEL TO THIS CASE AND THE DICTUM IS WHOLLY INAPPLICABLE TO THIS CASE.

THE FACTS IN SHARP DEAL WITH A SITUATION WHERE A MAN SOLD A PIECE OF PROPERTY TO HIS SECOND DAUGHTER FOR $1.00. THE MAN DIED WITHOUT THE CONVEYANCE HAVING BEEN RECORDED. THE PARCEL WENT INTO THE ESTATE OF MR. SHARP, THE DECEASED. THE APPELLANT, WHO WAS THE THIRD

DAUGHTER OF MR. SHARP, WAS THE SUCCESSOR IN INTEREST TO THE SECOND DAUGHTER OF MR. SHARP. (THE UNRECORDED CONVEYANCE WAS TO THE SECOND DAUGHTER.). THE THIRD DAUGHTER SOUGHT A DETERMINATION UPON HER PETITION FOR SPECIFIC PERFORMANCE EG TO COMPEL THE ADMINISTRATOR TO ISSUE A CONVEYANCE TO HER BASED UPON UTAH CODE ANNOTATED 1953 75-11-26. THIS STATUTE IS TITLED:

"SPECIFIC PERFORMANCE OF DECEDENT'S CONTRACTS"

THIS STATUTE READS, "WHEN A PERSON, WHO IS BOUND BY CONTRACT IN WRITING TO CONVEY ANY REAL ESTATE ... DIES BEFORE MAKING THE CONVEYANCE, ASSIGNMENT, TRANSFER ... AND IN ALL CASES WHEN SUCH DECEDENT, IF LIVING, MIGHT BE COMPELLED TO MAKE SUCH CONVEYANCE, ASSIGNMENT, TRANSFER ... THE COURT MAY MAKE A DECREE AUTHORIZING AND DIRECTING HIS EXECUTOR OR ADMINISTRATOR TO CONVEY SUCH REAL ESTATE ... TO THE PERSON ENTITLED

THERETO.".

THE LOWER UTAH COURT DENIED THE PETITION CITING UTAH CODE ANNOTATED 1953 75-9-4 TITLED, "CLAIMS TO BE PRESENTED WITHIN TIME LIMITS -- EXCEPTIONS". THIS STATUTE READS, "ALL CLAIMS ARISING UPON CONTRACT, WHETHER THE SAME ARE DUE, NOT DUE OR CONTINGENT, MUST BE PRESENTED WITHIN THE TIME LIMITED IN THE NOTICE, AND ANY CLAIM NOT PRESENTED IS BARRED FOREVER;...". (THE "NOTICE" CITED IN THE STATUTE IS THE NOTICE TO CREDITORS REQUIRED BY 75-9-1. THE TIME LIMITS ARE DEFINED IN 75-9-2, WHICH READS IN PART "THE TIME EXPRESSED IN THE NOTICE, UNLESS OTHERWISE ORDERED BY THE COURT, MUST BE FOUR MONTHS AFTER ITS FIRST PUBLICATION WHEN THE ESTATE EXCEED IN VALUE THE SUM OF $10,000., AND TWO MONTHS WHEN IT DOES NOT...".)

THE QUESTION AT BAR IN THE UTAH SUPREME COURT WAS WHETHER OR NOT THE "CLAIM" FILED BY

APPELLANT WAS A "CLAIM" AS THAT TERM IS USED IN 75-9-4 AND THEREFORE BARRED BY THAT STATUTE SINCE APPELLANT DID NOT FILE HER "CLAIM" WITHIN THE STATUTORY PERIOD. THE COURT HELD AT 1037, "THIS WAS A PETITION FOR SPECIFIC PERFORMANCE OF A CONTRACT TO CONVEY REAL ESTATE, AND FELL SQUARELY WITHIN THE PROVISIONS OF 75-11-26.". THE STATUTORY LIMITATION DID NOT APPLY.

TITLE 75 OF THE UTAH CODE ANNOTATED 1953 IS IDENTIFIED IN 75-1-1 AS "...THE PROBATE CODE". THE QUESTION IN SHARP INVOLVED THE RIGHT OF A PERSON TO ENFORCE AN EQUITABLE CLAIM TO REAL ESTATE AGAINST AN ESTATE. THIS CASE DOES NOT INVOLVE A CLAIM BY DEFENDANT CHEVRON AGAINST THE ESTATE OF IRA BROWNING; THAT ESTATE WAS CLOSED IN AUGUST 1927 WITHOUT ANY CLAIM BEING MADE BY EITHER KEMMERER COAL OR P. J. QUEALY. THIS CASE INVOLVES THE CORPORATE SUCCESSOR TO KEMMERER COAL AND THE GRANDSON OF

IRA BROWNING SOME 60 YEARS LATER. THE DICTUM OF SHARP IS RELEVANT ONLY TO PROBATE PROCEEDINGS AND THE ATTEMPT TO APPLY THE DICTUM HERE IS WHOLLY IN ERROR.

THE CLOSING AND DISTRIBUTION OF THE ESTATE OF IRA BROWNING TERMINATED THE POSSIBILITY OF ANY RIGHTS BEING ASSERTED AGAINST THE ESTATE. THE RIGHTS WHICH WERE HELD BY KEMMERER COAL WERE NOT EXTINGUISHED BY THE CLOSING OF THE ESTATE OF IRA BROWNING. THOSE RIGHTS WERE ASSERTABLE AGAINST THE HEIRS OF IRA BROWNING WHO, BY VIRTUE OF THE OMNIBUS CLAUSE IN THE ORDER DISTRIBUTING THE ESTATE OF IRA BROWNING, SUCCEEDED TO THE TITLES HELD BY IRA BROWNING -- WHETHER OR NOT THOSE TITLES WERE KNOWN (INVENTORIED) IN THE ESTATE. THE HEIRS OF IRA BROWNING WERE CHARGEABLE AS CONSTRUCTIVE TRUSTEE AND COULD HAVE BEEN COMPELLED TO CONVEY TITLE -- OR JUDICIALLY DIVESTED OF SAME, BUT -- ONLY FOR

THE STATUTORILY STATED PERIOD OF TIME FOR ANALOGOUS CASES AT LAW. KEMMERER COAL HAD A REMEDY AVAILABLE TO THEM WHICH THEY FAILED TO PURSUE. TIME AND INACTION EXTINGUISHED THE RIGHTS OF KEMMERER/GULF/CHEVRON.

THE ISSUE AS TO WHETHER OR NOT A REPUDIATION WAS NECESSARY IN THIS CASE TO SET THE CLOCK RUNNING FOR A DETERMINATION THAT KEMMERER/GULF/CHEVRON WAS GUILTY OF LACHES SEEMS TO TROUBLE THE LOWER COURTS. THE APPLICABLE BODY OF UTAH LAW, WHICH FINDS VOICE IN SCOTT ON TRUSTS §104, §404.1, §462 AND RESTATEMENT RESTITUTION §160 (DISCUSSED SUPRA) SHOW CONCLUSIVELY THAT MAY AND LEE BROWNING WERE CHARGEABLE ONLY AS CONSTRUCTIVE TRUSTEES.

SCOTT ON TRUSTS §409 AND §481.1 STATE THAT, IN THE CASE OF A CONSTRUCTIVE TRUST, THE BENEFICIARY MAY BE GUILTY OF LACHES WITHOUT A REPUDIATION BECAUSE OF THE PRESUMPTION OF AD-

VERSITY. THERE IS, IN §481.1 OF SCOTT ON TRUSTS, A PROVISION FOR SITUATIONS IN WHICH THE APPROPRIATE REMEDY IS A CONSTRUCTIVE TRUST YET THE FACTUAL CIRCUMSTANCES ARE SUCH THAT THE RELATIONSHIP IS DEMONSTRABLY NON-ADVERSARIAL. IN SUCH CASES THE PRESUMPTION OF ADVERSITY CAN BE OVERCOME. THE RELEVANT PORTION OF SCOTT ON TRUSTS 1967 EDITION V. 5 PAGE 3465 READS, "WHERE THE BENEFICIARY OF A CONSTRUCTIVE TRUST, HOWEVER, HAS NO REASON TO BELIEVE THAT THE CONSTRUCTIVE TRUSTEE IS HOLDING THE PROPERTY ADVERSELY, THE BENEFICIARY WILL NOT BE BARRED BY LACHES EVEN THOUGH HE KNOWS OF THE CIRCUMSTANCES GIVING RISE TO THE CONSTRUCTIVE TRUST. THUS WHERE A CONVEYS LAND TO B, WHO ORALLY AGREES TO RECONVEY IT TO A, AND B IS IN A CONFIDENTIAL RELATION TO A, B HOLDS THE PROPERTY UPON A CONSTRUCTIVE TRUST FOR A. IN SUCH A CASE A IS NOT GUILTY OF LACHES IN FAIL-

ING TO SUE AS LONG AS B HAS NOT REPUDIATED HIS PROMISE.".

THE OPINION IN THIS CASE CITES WALKER V. WALKER, 404 P 2ND 253, AS STATING THAT A REPUDIATION IS NECESSARY IN THIS CASE (APP A P 36A). THE OPINION FAILS TO CITE FACTS WHICH MAKE WALKER APPLICABLE TO THIS CASE AND FAILS TO CITE ANY PASSAGE FROM THE TEXT OF THE OPINION.

THE FACTUAL CIRCUMSTANCES OF WALKER ARE ENTIRELY DIFFERENT FROM THE CIRCUMSTANCES IN THIS CASE. IN WALKER THE OLDEST SON UNDERTOOK TO RAISE FUNDS WITH WHICH TO BUY BACK "FAMILY PROPERTY" WHICH HAD BEEN SOLD FOR DELINQUENT TAXES. THE TERM "FAMILY PROPERTY" REFERS TO PROPERTY OWNED BY THE PARENTS OF WHICH THE HEIRS EXPECTED TO INHERIT A PORTION. AN AGREEMENT BETWEEN THE FAMILY MEMBERS WAS EXECUTED STATING THAT THE OLDEST BROTHER WAS AUTHORIZED TO ATTEMPT TO BUY BACK THE PROPERTY WHICH HAD BEEN

LOST. THE REMAINING HEIRS AGREED TO PAY TO THE OLDEST BROTHER, THE DEFENDANT/RESPONDENT IN THIS ACTION, THEIR PRO RATA SHARE OF THE COSTS, WITH INTEREST, (AT 255-256). THE EFFORT WAS UNDERTAKEN AND WAS SUCCESSFUL. SOME YEARS LATER, FOLLOWING THE DEATHS OF WALKER'S FATHER AND MOTHER, THE HEIRS SUED THE OLDEST BROTHER FOR THEIR SHARES OF THE "FAMILY PROPERTY", TITLE TO WHICH HAD BEEN TAKEN SOLELY IN THE NAME OF THE OLDEST SON WHEN HE BOUGHT BACK THE "FAMILY PROPERTY". THE LOWER UTAH COURT HELD THAT THE HEIRS WHO DID NOT HOLD TITLE WERE ENTITLED TO THEIR RESPECTIVE SHARES IN THE LAND, PROVIDED THEY REPAY THE OLDEST SON THEIR PRO RATA SHARE OF THE PRINCIPAL EXPENDED TO REPURCHASE THE LAND AND THE INTEREST THEREUPON -- AS PROVIDED IN THEIR WRITTEN AGREEMENT. THE OLDEST SON SOUGHT TO INVOKE THE EQUITABLE DOCTRINE OF LACHES TO BAR ANY RECOVERY BY THE OTHER HEIRS.

IN AFFIRMING THE DECISION OF THE LOWER COURT THE UTAH SUPREME COURT HELD THAT, BASED UPON THE ORIGINAL WRITTEN AGREEMENT, THE OLDEST SON WAS ACTING AS A TRUSTEE FOR THE ENTIRE FAMILY. THE COURT HELD THAT THE FACTS OF THE ONGOING FAMILIAL AND BUSINESS RELATIONSHIPS CLEARLY SHOWED THAT THE RELATIONSHIP WAS NON-ADVERSIAL AND, THEREFORE, SOME DEMONSTRABLE CHANGE IN THE RELATIONSHIP WAS NECESSARY, SUCH AS A REPUDIATION OF THE TRUST ARRANGEMENT, TO START THE CLOCK RUNNING FOR THE ELAPSED TIME TO BEGIN ACCUMULATING TOWARD A LACHES SITUATION. THE DEFENSE OF LACHES WAS DISALLOWED BY THE UTAH SUPREME COURT IN THIS CASE.

THERE ARE NO FACTUAL PARALLELS BETWEEN THE CASE AT HAND AND WALKER. THE PREOCCUPATION OF THE LOWER COURTS WITH THE DOCTRINE OF REPUDIATION IS WHOLLY MISPLACED IN THE INSTANT CASE. NO EVIDENCE WAS INTRODUCED TO ATTEMPT TO OVER-

COME THE PRESUMPTION OF ADVERSITY IN THE CONSTRUCTIVE TRUST WHICH AROSE IN THIS CASE. SINCE THE PRESUMPTION OF ADVERSITY WAS NOT OVERCOME, NO REPUDIATION WAS NECESSARY. THE APPLICATION OF ANY OF THE DICTA FROM WALKER TO THIS CASE IS WHOLLY ERRONEOUS.

IN APPENDIX A PAGE 40-A THE OPINION SPEAKS OF THE CURRENT VALUE OF THE PROPERTIES INVOLVED IN THIS LITIGATION. THIS IS WHOLLY IMMATERIAL.

IN APPENDIX A PAGE 40-A, THE OPINION SPEAKS OF THIRD PARTIES WHOSE RIGHTS MAY BE THREATENED SHOULD PLAINTIFF/PETITIONER PREVAIL IN THIS ACTION. THESE "PARTIES" AND THEIR "INTERESTS" ARE UNNAMED. IF THE DEFENDANTS PURCHASE FROM PETITIONER THE PROPERTY RIGHTS WHICH HE HOLDS, AS MR. BERTOLI INDICATED WOULD BE THE CASE IN 1980, THEY WOULD THEN HOLD THE PROPERTY RIGHTS WHICH THEY HAVE REPRESENTED THEY NOW HOLD. THIS IS EQUITY. THIS WOULD BE FAIR TO ALL

CONCERNED.

THE LOWER COURTS ASSERT AT 40-A THAT"THE DEFENDANTS HAVE EXPENDED UNTOLD SUMS OVER DECADES OF QUIET ENJOYMENT TO IMPROVE AND DEVELOP THE LANDS THAT THE PLAINTIFF NOW CLAIMS BELONG TO HIM.". THIS PRONOUNCEMENT WHOLLY MISSTATES THE FACTS IN EVIDENCE AND THE TRUTH OF THE MATTER. THE FEE ACREAGE IS BARE, VACANT, UNUSED, UNIMPROVED LAND. THE COAL AND MINING RIGHTS ACREAGE HAS NOT BEEN MINED AT ALL, SAVE AN INTRUSION WHICH REMOVED THE COAL FROM APPROXIMATELY ONE-EIGHTH OF ONE ACRE. AN UNDERGROUND SURVEY WAS CONDUCTED TO DISCOVER THIS INTRUSION. WHILE THERE IS SOME MINING EQUIPMENT IN THE AREA WHICH BELONGS TO DEFENDANTS, IT IS USED ON OTHER ACREAGE. DEFENDANTS HAVE COAL AND MINING RIGHTS ON MANY TENS OF THOUSANDS OF ACRES IN EMERY COUNTY. HOW DID THE LOWER COURTS DETERMINE THAT "UNTOLD SUMS" HAVE BEEN SPENT ON PLAIN-

TIFF'S PROPERTY? WE ARE NOT TOLD. INDEED, VERY LITTLE MINING HAS BEEN DONE ON THE PROPERTIES PROXIMATELY SURROUNDING PLAINTIFF'S PROPERTY SINCE THE DEATH, IN 1926, OF IRA BROWNING WHO OPERATED THE "BROWNING WAGON MINE" ON ADJACENT PROPERTIES WHICH HE LEASED FROM SAN RAFAEL FUEL.

THE FAILURE OF THE LOWER COURTS TO APPLY THE LAWS OF THE STATE OF UTAH TO THE FACTS OF THIS CASE, TOGETHER WITH THE FAILURE OF THE LOWER COURTS TO STATE THE FACTUAL AND LEGAL BASES OF THEIR DECISIONS, AND THEIR FAILURE TO RULE UPON THE MATERIAL ISSUES RAISED BY PLAINTIFF/PETITIONER HAS VIOLATED THE ERIE DOCTRINE AND EFFECTIVELY DENIED PLAINTIFF/PETITIONER HIS DAY IN COURT. INSOFAR AS THE JUDGMENTS PURPORT TO DEPRIVE PETITIONER OF THE TITLES HE HOLDS TO THE FEE ACREAGE, THE JUDGMENTS ARE DEPRIVING PETITIONER OF HIS PROPERTY RIGHTS BASED UPON A DEFICIENT PROCEEDING IN VIOLATION OF THE FIFTH

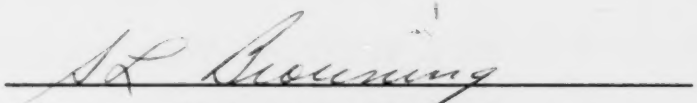
AMENDMENT OF THE UNITED STATES CONSTITUTION.

C O N C L U S I O N

FOR THE FOREGOING REASONS, PETITIONER STEPHEN L. BROWNING, RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

DATED 21 JANUARY 1988

RESPECTFULLY SUBMITTED,



STEPHEN L. BROWNING
PETITIONER, PRO SE

P. O. BOX 4010
BURBANK, CALIF. 91503
(818) 842-5288

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* *

STEPHEN L. BROWNING,	*	C-83-0772J
PLAINTIFF	*	MEMORANDUM OPINION
VS.	*	AND ORDER
GULF OIL CORPORATION, ET AL	*	
DEFENDANTS	*	
	*	

* *

THIS MATTER CAME BEFORE THE COURT ON DECEMBER 14, 1984 FOR A HEARING ON THE PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT. RUSSELL A. CANNON AND HAROLD WILKINSON APPEARED FOR THE PLAINTIFF STEPHEN L. BROWNING. CLARON C. SPENCER APPEARED FOR THE DEFENDANT GULF OIL CORPORATION, AND PATRICIA J. WINMILL APPEARED FOR THE DEFENDANT CONSOLIDATION OIL COMPANY. THE COURT TOOK THE PLAINTIFF'S MOTION UNDER ADVISEMENT, TO

BE CONSIDERED TOGETHER WITH THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, WHICH HAD BEEN ARGUED ON OCTOBER 24, 1984. NOW, AFTER CONSIDERING THE ARGUMENTS OF THE PARTIES MADE AT THE HEARINGS AS WELL AS IN SUPPLEMENTAL MEMORANDA SUBMITTED AFTER ORAL ARGUMENT, REVIEWING THE FILE AND RESEARCHING THE ISSUES PRESENTED, THE COURT ENTERS THIS MEMORANDUM OPINION.

THIS DISPUTE CONCERNS THE OWNERSHIP OF INTERESTS IN PROPERTY LOCATED IN EMERY COUNTY, UTAH. THE PARTIES ARE THE SUCCESSORS IN INTEREST OF PEOPLE AND ENTITIES LONG SINCE DEAD OR DEFUNCT WHOSE ACTIONS AND INTENTIONS MUST BE GLEANED FROM AGED, INCOMPLETE AND IMPRECISE RECORDS. ANOTHER COURT IN SIMILAR CIRCUMSTANCES OBSERVED:

> OF THE MEN WHO WERE THEN ACTIVE IN LIFE, AND CAPABLE OF BEING WITNESSES, NOT ONE IN TWENTY THOUSAND IS NOW LIVING. WRITTEN DOCUMENTS WHOSE PRODUCTION MIGHT HAVE SETTLED THIS DISPUTE INSTANTLY, HAVE BEEN, IN ALL HUMAN PROBABILITY, DESTROYED, OR LOST, OR THROWN AWAY AS USELESS. THE MATTER BELONGS TO A PAST AGE OF WHICH WE CAN HAVE NO KNOWLEDGE, EXCEPT WHAT WE DERIVE FROM HISTORY, THROUGH WHOSE MEDIUM WE CAN DIMLY

> DISCERN THE OUTLINES OF GREAT PUBLIC EVENTS, BUT ALL THAT PERTAINS TO MEN'S PRIVATE AFFAIRS IS WHOLLY INVISIBLE, OR ONLY VISIBLE IN SUCH A SORT AS TO CONFOUND THE SENSE AND MISLEAD THE JUDGMENT.

STRIMPFLER V. ROBERTS, 18 PA. 283, 299, 57 AM. DEC. 606, CITED IN BOGERT, THE LAW OF TRUSTS § 169, AT 636 [5TH ED. 1972]. THOSE INHERENT DIFFICULTIES HAVE NOT BEEN MITIGATED IN THIS CASE BY THE VOLUMINOUS PLEADINGS OF THE PARTIES. NEVERTHELESS, THIS COURT EARNESTLY SEEKS TO PUT THE ASCERTAINABLE AND UNDISPUTED FACTS IN PERSPECTIVE, AND TO DERIVE THEREFROM CONCLUSIONS THAT WILL APPROPRIATELY DISPOSE OF THIS MATTER AS TO ALL PARTIES, PAST AND PRESENT.

THE PROPERTY RIGHTS IN DISPUTE MAY BE CLASSIFIED IN TWO GENERAL CATEGORIES, THE COAL RIGHTS AND THE FEE LANDS. BECAUSE THE FACTS AND LEGAL CLAIMS SURROUNDING THESE TWO CATEGORIES OF PROPERTY INTERESTS ARE DISCRETE, THEY WILL BE DISCUSSED AND ANALYZED SEPARATELY.

I. FACTS

A. THE COAL RIGHTS

IRA R. BROWNING, THE GRANDFATHER OF THE PLAINTIFF, STEPHEN L. BROWNING, WAS APPARENTLY A MAN OF SOME MEANS AND PROMINENCE WHO, AMONG HIS OTHER ACTIVITIES IN THE EARLY DAYS OF UTAH'S STATEHOOD, WAS INVOLVED IN ACQUIRING AND DEVELOPING COAL LANDS IN THE SOUTHEASTERN PART OF THE STATE. HE WAS ASSOCIATED IN THIS ENDEAVOR WITH VARIOUS INDIVIDUALS AND ENTITIES, INCLUDING ONE PATRICK J. QUEALY, THE SAN RAFAEL COAL COMPANY, AND THE KEMMERER COAL COMPANY, THE PREDECESSOR IN INTEREST OF THE DEFENDANTS CONSOLIDATION COAL COMPANY AND GULF OIL CORPORATION. WHILE THE RELATIONSHIP BETWEEN IRA AND HIS ASSOCIATES IS NOT ALTOGETHER CLEAR, THE RECORD SHOWS THAT ON MORE THAN ONE OCCASION IRA ACQUIRED MINERAL RIGHTS OR FEE LANDS IN HIS OWN NAMD AND EITHER CONVEYED THEM TO OR HELD THEM IN TRUST FOR THOSE ASSOCIATES. FOR EXAMPLE, MINUTES OF A MEETING OF THE KEMMERER COAL COMPANY BOARD OF TRUSTEES

SHOW THAT AS EARLY AS 1908 IRA HELD PROPERTY FOR KEMMERER WHICH HE WAS TO TRANSFER TO P.J.QUEALY.

THE SPECIFIC MINERAL RIGHTS IN DISPUTE IN THIS CASE [THE "COAL RIGHTS"] WERE THE SUBJECT OF THREE SEPARATE QUITCLAIM DEEDS FROM IRA R. BROWNING TO P. J. QUEALY IN 1912. THE DEEDS RECITED AS FOLLOWS:

> IRA R. BROWNING AND MAY B. BROWNING, HIS WIFE, GRANTORS, RESIDING AT CASTLE DALE, UTAH, HEREBY QUIT-CLAIM UNTO PATRICK J. QUEALY, TRUSTEE, GRANTEE, RESIDING AT KEMMERER, WYOMING, FOR THE SUM OF ONE DOLLAR, ALL AND SINGULAR THE COAL OF EVERY KIND AND NATURE LYING AND BEING BENEATH THE SURFACE OF THE FOLLOWING DESCRIBED TRACTS AND PARCELS OF LAND . . .

AND INCLUDED A DESCRIPTION OF THE SUBJECT PROPERTY. FOR SOME UNKNOWN REASON THOSE THREE DEEDS WERE NOT IMMEDIATELY RECORDED.

THE CHAIN OF RECORD TITLE TO THE COAL RIGHTS IS AS FOLLOWS. PATRICK J. QUEALY DIED ON NOVEMBER 17, 1930. ALTHOUGH RECORD TITLE WAS STILL IN THE NAME OF IRA R. BROWNING, THE COAL RIGHTS SUBSEQUENTLY PASSED BY A DECREE OF DISTRI-

BUTION DATED JUNE 2, 1949, TO QUEALY'S WIDOW. ON JUNE 21, 1949, THE THREE WARRANTY DEEDS FROM IRA TO P. J. QUEALY WERE RECORDED. BY WARRANTY DEED RECORDED JUNE 22, 1949, QUEALY'S WIDOW CONVEYED THE COAL RIGHTS TO L. M. PRATT, THEN-PRESIDENT OF KEMMERER COAL COMPANY. BY SPECIAL WARRANTY DEED RECORDED MARCH 4, 1954, PRATT CONVEYED THE COAL RIGHTS TO KEMMERER, AND ON APRIL 19, 1965, KEMMERER RECORDED A NOTICE OF CLAIM OF INTEREST AS TO THE COAL RIGHTS. FINALLY, BY DEEDS RECORDED JULY 8, 1981, AND FEBRUARY 7, 1983, KEMMERER CONVEYED THE COAL RIGHTS ALONG WITH OTHER REAL PROPERTY TO THE DEFENDANTS.

THE PLAINTIFF SUGGESTS AN ALTERNATIVE CHAIN OF TITLE. IRA BROWNING DIED INTESTATE ON NOVEMBER 26, 1926. AN ORDER AND DECREE DISTRIBUTING HIS ESTATE DISPOSED OF CERTAIN INTERESTS IN LAND, BUT THE SPECIFIC COAL RIGHTS AT ISSUE HERE WERE NOT AMONG THEM. THE ORDER CONTAINED A RESIDUARY CLAUSE, HOWEVER, GRANTING TO IRA'S

WIDOW MAY AND HIS SON LEE EQUAL SHARES IN ALL PROPERTY OF WHICH IRA DIED SEIZED, "OF WHATEVER KIND, CHARACTER AND DESCRIPTION AND WHERESOEVER SITUATE, NOT NOW KNOWN OR DISCOVERED." IT IS UNDISPUTED THAT THE PLAINTIFF STEPHEN L. BROWNING IS THE SOLE HEIR OF MAY AND LEE BROWNING. HE CLAIMS THAT THE COAL RIGHTS WERE THE RES OF A TRUST AND THEREFORE PASSED UNDER THE RESIDUARY CLAUSE TO HIM. THUS THE ORDER DISTRIBUTING IRA BROWNING'S ESTATE COMPLICATES WHAT WOULD OTHERWISE BE A RELATIVELY SIMPLE DETERMINATION BASED ON RECORD TITLE.

ABOUT A WEEK AFTER THE ORDER WAS SIGNED, ONE WILLIAM PISCHEL, AN ATTORNEY AND ASSOCIATE OF IRA IN VARIOUS VENTURES, WROTE A LETTER TO MAY EXPLAINING THE ORDER. THE LETTER STATED IN PART:

> THE COUNTY RECORDER CALLS ATTENTION TO THE FACT THAT THERE ARE OTHER LANDS OR UNDERGROUND COAL RIGHTS THAN THOSE DESCRIBED IN THE DECREE THE TITLE TO WHICH STANDS IN THE NAME OF MR. BROWNING. MY UNDERSTANDING IS THAT AS TO SUCH OTHER

LANDS OR COAL RIGHTS MR. BROWNING HAS PASSED A DEED TO MR. QUEALY OR HIS INTERESTS, BUT THAT THE DEED HAS NEVER BEEN RECORDED. YOU MAY HAVE DEFINITE KNOWLEDGE OF THIS. THE OTHER LANDS OR COAL RIGHTS REFERRED TO ARE STATED BY THE RECORDER TO BE IN SECTIONS 2, 10, AND 26, TOWNSHIP 22, RANGE 6 EAST. AS THE DECREE IS DRAWN THE TITLE TO SUCH OTHER LANDS OR COAL RIGHTS WOULD PASS TO YOU AND LEE, EVEN THOUGH NOT SPECIFICALLY DESCRIBED IN THE DECREE, BUT IT MIGHT BE WELL FOR YOU TO SATISFY YOURSELF AT THIS TIME WHETHER OR NOT THE FACTS RELATIVE THERETO ARE AS SUGGESTED ABOVE.

IT IS NOT ENTIRELY CLEAR FROM THE UNDISPUTED FACTS WHETHER MAY BROWNING EVER FOLLOWED MR. PISCHEL'S ADVICE WITH RESPECT TO THE COAL RIGHTS. IT IS UNDISPUTED THAT MAY BROWNING WROTE TO P. J. QUEALY ON TWO OCCASIONS IN APRIL 1928 EXPRESSING HER DESIRE TO SELL "OUR COAL LAND" WITHOUT FURTHER DESCRIBING SUCH LAND AND COMPLAINING OF THE FINANCIAL DRAIN CAUSED BY THE TAXES ON THE LAND. SIMILARLY, MAY BROWNING AGAIN WROTE TO MR. QUEALY IN AUGUST 1928, THIS TIME OFFERING TO SEND A COPY OF A PLAT "SHOWING THE LOCATION OF OUR COAL LAND WITH THAT OF THE

SAN RAFAEL FUEL CO. AND THE KEMMERER COAL CO. [P. J. QUEALY, TRUSTEE]." MRS. BROWNING FURTHER STATED THAT THE COAL LANDS WHICH SHE AND HER SON HAD INHERITED FROM THE ESTATE AMOUNTED TO 3,189.31 ACRES, BUT AGAIN SHE DID NOT SPECIFICALLY IDENTIFY THE PROPERTY.[1] ALTHOUGH THE PARTIES AGREE THAT THE "LANDS OF COAL RIGHTS" SPECIFICALLY REFERRED TO IN MR. PISCHEL'S LETTER ARE AMONG THOSE AT ISSUE IN THIS CASE, IT IS IMPOSSIBLE TO ASCERTAIN WHETHER THE "COAL LAND" REFERRED TO IN MRS. BROWNING'S LETTERS INCLUDES THE COAL RIGHTS.

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[1]IT SHOULD BE NOTED THAT THIS AMOUNT ROUGHLY CORRESPONDS TO THE TOTLE ACREAGE SPECIFICALLY LISTED IN THE ORDER DISTRIBUTING IRA BROWNING'S ESTATE. THE PLAINTIFF, OF COURSE, CLAIMS THAT THE COAL RIGHTS AND THE FEE LANDS WERE ADDITIONAL PROPERTIES NOT SPECIFICALLY LISTED BUT WITHIN THE EMBRACE OF THE RESIDUARY CLAUSE.

OTHER DOCUMENTS THAT REFER SPECIFICALLY TO THE COAL RIGHTS INCLUDE THE MINUTES OF A MEETING OF THE SAN RAFAEL COAL COMPANY DATED SEPTEMBER 4, 1931, AND A TITLE OPINION DATED JUNE 5, 1957. THE MINUTES DISCUSS A 15-ACRE PARCEL THAT WAS AMONG THE SURFACE LANDS ABOVE THE COAL RIGHTS. THEY INDICATE THAT THE STATE OF UTAH REQUIRED MAY AND LEE BROWNING TO SIGN WAIVERS OF INTEREST IN THE SURFACE LAND IN 1931 TO SUBORDINATE THEIR INTEREST TO THE STATE'S MORTGAGE WITH THE SURFACE OWNER. THAT PARTICULAR LAND IS NOT SUBJECT TO DISPUTE IN THIS CASE BECAUSE THE STATE APPARENTLY FORECLOSED THE MORTGAGE AND NOW OWNS THE PARCEL. HOWEVER, THE FACT THAT THE BROWNINGS WERE REQUIRED TO EXECUTE THE WAIVERS INDICATES AT THE VERY LEAST THAT THE BROWNINGS WERE THE RECORD OWNERS OF THE COAL RIGHTS AS OF 1931 AND THAT THE BOARD OF SAN RAFAEL, A COMPANY CLOSELY AFFILIATED WITH KEMMERER COAL[2], KNEW AS MUCH.

[2]THE UNDISPUTED FACTS SHOW THAT L. M. PRATT,

THE 1957 TITLE OPINION WAS DIRECTED TO THE PRESIDENT OF SAN RAFAEL AND CONCERNED "FEE LANDS AND UNDERGROUND COAL RIGHTS PURPORTEDLY OWNED BY SAN RAFAEL FUEL COMPANY AND THE KEMMERER COAL COMPANY." AMONG THE COAL RIGHTS EXAMINED WERE THOSE PASSED TO P. J. QUEALY BY TWO OF THE QUIT-CLAIM DEEDS FROM IRA BROWNING REFERRED TO ABOVE.[3] THE TITLE OPINION STATES IN PART:

> SAID COAL RIGHTS WERE DEEDED TO P.J.QUEALY, TRUSTEE, BY IRA R. BROWNING BY DEED DATED 3/16/12, BUT THIS DEED WAS NOT RECORDED UNTIL 6/21/49. IN THE INTERIM, IRA R. BROWNING HAD DIED. A COURT ACTION WAS SUBSEQUENTLY BROUGHT AGAINST MAY B. BROWNING AND LEE B. BROWNING, SURVIVING HEIRS OF IRA R. BROWNING, AND THEY SIGNED DISCLAIMERS OF INTEREST IN SAID LANDS. A COURT DECREE WAS RECORDED DECLARING THE PLAINTIFFS IN THIS ACTION FEE SIMPLE OWNERS OF SAID LANDS. SINCE BOTH THE DISCLAIMER OF INTEREST AND THE COURT DECREE WERE RECORDED SUBSEQUENT TO THE RECORDING OF THE DEED ABOVE, AND SINCE I HAVE BEEN INFORMED VERBALLY THAT MR. QUEALY DID NOT HAVE ACTUAL NOTICE OF

THE PRESIDENT OF KEMMERER COAL AND THE PERSON TO WHOM P. J. QUEALY'S WIDOW CONVEYED THE COAL RIGHTS, WAS A MEMBER OF THE BOARD OF SAN RAFAEL. IRA BROWNING HIMSELF WAS INTIMATELY INVOLVED IN THE INCORPORATION AND MANAGEMENT OF SAN RAFAEL. THE COMPANIES AND THEIR PERSONNEL ALL SEEM TO BE RELATED.

> SAID DISCLAIMER OR COURT DECREE, I AM OF THE OPINION THAT TITLE TO SAID COAL RIGHTS DID VEST IN L. M. PRATT . . . . . .

NEITHER PARTY HAS PRODUCED EITHER THE DISCLAIMERS OR THE COURT DECREE REFERRED TO IN THIS OPINION. THUS IT IS IMPOSSIBLE TO KNOW WHO BROUGHT THE SUIT OR WHEN IT OCCURRED. BUT IT IS SIGNIFICANT THAT MAY AND LEE BROWNING, THROUGH WHOM THE PLAINTIFF CLAIMS THE COAL RIGHTS AS SOLE HEIR, APPARENTLY DISCLAIMED ANY INTEREST IN SOME OF THE COAL RIGHTS.

ONE OTHER FACT RELEVANT TO THE COAL RIGHTS BEARS EMPHASIZING. P. J. QUEALY WAS A MEMBER OF THE BOARD OF TRUSTEES OF KEMMERER COAL COMPANY AT THE TIME THE COAL RIGHTS WERE CONVEYED TO HIM. HE SOMETIMES ACQUIRED LANDS ON KEMMERER'S BEHALF AS TRUSTEE. FOR EXAMPLE, A LETTER FROM IRA

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[3]THE TITLE OPINION MISTAKENLY IDENTIFIES THE PROPERTY IT DISCUSSES AS HAVING BEEN THE SUBJECT OF THE DEED OF MARCH 16, 1912. IT IS CLEAR FROM THE LEGAL DESCRIPTIONS, HOWEVER, THAT THE PROPERTY WAS ACTUALLY THE SUBJECT OF THE DEEDS OF MAY 11, 1912, AND MAY 13, 1912.

BROWNING TO P. J. QUEALY DATED SEPTEMBER 23, 1924, SHEDS SOME LIGHT ON THE PARTIES' RELATIONSHIP:

> SEVERAL YEARS AGO I EXECUTED AND FORWARDED TO YOU A QUIT-CLAIM DEED, CONVEYING TO YOU, AS TRUSTEE, ALL LANDS AND COAL RIGHTS PURCHASED BY ME FOR YOU WHICH WERE NOT TRANSFERRED TO THE SAN RAFAEL FUEL COMPANY. THE ABSTRACTS SHOW THAT YOU HAVE SO FAR FAILED TO RECORD THIS DEED .... MR. WILSON NEEDS THIS DEED IN PREPARING THE DEFENSE OF THE SUITS FILED BY THE GENERAL LAND OFFICE AND REQUESTS THAT YOU MAIL IT TO HIM AT YOUR EARLIEST CONVENIENCE.

THAT LETTER PROVES THAT IRA BROWNING PURCHASED AT LEAST SOME COAL RIGHTS FOR QUEALY AND CONVEYED THEM TO HIM "AS TRUSTEE," ALTHOUGH IT IS STILL NOT CLEAR WHETHER THE COAL RIGHTS OR THE DEED REFERRED TO IN THAT LETTER INVOLVES THE PROPERTIES AT ISSUE IN THIS CASE. SEVERAL OTHER DOCUMENTS IN THE RECORD REFER TO "P. J. QUEALY, TRUSTEE," AND THE CLEAR PURPOSE OF THAT DESIGNATION IS TO IDENTIFY QUEALY AS A MEMBER OF KEMMERER'S BOARD OF TRUSTEES.

B. THE FEE LANDS

THE UNDISPUTED FACTS RESPECTING THE FEE LANDS ARE RELATIVELY SIMPLE. PERHAPS AS A TOKEN OF POETIC JUSTICE, THE ROLES AND POSITIONS OF THE PARTIES ARE REVERSED. RECORD TITLE TO THE FEE LAND RESTS WITH THE PLAINTIFF, BUT THE DEFENDANTS CLAIM AN IMPLIED TRUST IN THOSE LANDS.

IN 1913 IRA R. BROWNING ACQUIRED AN OPTION FROM G. A. NIXON AND J. K. WALKER TO PURCHASE THEIR INTEREST IN CERTAIN LANDS THE TITLE TO WHICH WAS THEN IN THE STATE OF UTAH (THE "FEE LANDS"). HE PAID $250 FOR THE OPTION, WHICH CALLED FOR THE PAYMENT OF A TOTAL PURCHASE PRICE OF $2,000 PLUS AN ADDITIONAL DEFERRED PAYMENT NOT TO EXCEED $160 TO THE STATE OF UTAH. ON JANUARY 7, 1914, THE STATE OF UTAH ISSUED TWO PATENT DEEDS GRANTING FULL TITLE IN THE FEE LANDS TO IRA R. BROWNING. IRA RECORDED THE DEEDS ON JUNE 9, 1914.

THE ONLY OTHER RECORDED DOCUMENTS AFFECTING THE FEE LANDS ARE KEMMERER COAL'S NOTICE OF CLAIM

OF INTEREST DATED APRIL 19, 1965 (REFERRED TO ABOVE IN CONNECTION WITH THE COAL RIGHTS), A LEASE AGREEMENT BETWEEN KEMMERER COAL AND THE DEFENDANT CONSOLIDATION COAL, AND A CONVEYANCE TO GULF DATED JULY 8, 1982, AS WELL AS THE PLAINTIFF'S ORDER DETERMINING HEIRSHIP RECORDED IN 1983. THE FEE LANDS, LIKE THE COAL RIGHTS, WERE NOT SPECIFICALLY DISTRIBUTED UNDER THE ORDER AND DECREE OF DISTRIBUTION OF IRA BROWNING'S ESTATE. AGAIN , HOWEVER, THE PLAINTIFF CLAIMS THAT THE FEE LANDS PASSED TO HIM UNDER THE RESIDUARY CLAUSE, WHICH DISPOSED OF ALL THE REST OF IRA'S PROPERTY "WHERESOEVER SITUATE, NOT NOW KNOWN OR DISCOVERED.".

THE TAX NOTICES ON THE FEE LANDS WERE ADDRESSED TO IRA IN CARE OF THE KEMMERER COAL COMPANY. KEMMERER COAL IN FACT PAID THE TAXES ON THE FEE LANDS FOR A FEW YEARS IN THE 1920'S AND AGAIN FROM 1954 TO 1981. THE PLAINTIFF PAID THE TAXES ON THE FEE LANDS IN 1983 AFTER ASCERTAINING

HIS ALLEGED OWNERSHIP INTEREST THEREIN AS SOLE HEIR OF IRA R. BROWNING.

THE DEFENDANTS SUBMIT THAT ALTHOUGH THE PATENTS WERE ISSUED TO IRA, KEMMERER COAL -- ACTING THROUGH ITS TRUSTEE, P. J. QUEALY -- ACTUALLY FURNISHED THE CONSIDERATION FOR THE PURCHASE OF THE FEE LANDS. KEMMERER'S BOOKS SHOW A PAYMENT OF $250, WHICH CORRESPONDS WITH THE AMOUNT DUE UPON EXECUTION OF THE OPTION, AND A LATER PAYMENT OF $1,910., WHICH CORRESPONDS WITH THE BALANCE DUE INCLUDING THE DEFERRED PAYMENT. ON DECEMBER 1, 1912, IRA BROWNING WROTE TO P. J. QUEALY AS FOLLOWS:

> I REMAINED IN PRICE THE DAY YOU LEFT AND FINALLY CLOSED WITH WALKER AND NIXON FOR THE WALKER LAND, 320 ACRES, SURFACE AND COAL, FOR $2,160.00.

ONE WEEK LATER, IRA AGAIN WROTE TO QUEALY:

> I HAVE YOUR LETTER OF THE 4TH INSTANT AND ACKNOWLEDGE RECEIPT OF ENCLOSED CHECKS, AS FOLLOWS: ....$250 TO REIMBURSE ME IN THE AMOUNT PAID ON THE NIXON-WALKER OPTION TO PURCHASE, WHICH CHECK I AM RETURNING HEREWITH FOR THE REASON THAT I HAD, BEFORE ITS RECEIPT, ALREADY MADE DRAFT UPON YOU FOR

> THE FULL AMOUNT OF THE PURCHASE PRICE, VIZ $2,160., AS PER YOUR INSTRUCTIONS.

ALTHOUGH THE PLAINTIFF ATTEMPTS TO CONTROVERT THESE FACTS, THERE CAN BE NO GENUINE ISSUE THAT IRA BROWNING PURCHASED THE FEE LANDS WITH FUNDS ADVANCED TO HIM BY KEMMERER COAL.

SUBSEQUENT CORRESPONDENCE BETWEEN IRA BROWNING AND P. J. QUEALY FURTHER ELUCIDATES THEIR UNDERSTANDING AS TO THE FEE LANDS. ON MAY 11, 1914, IRA WROTE THAT HE THOUGHT THEY COULD "SELL THE SURFACE RIGHTS, WITHOUT LIABILITY TO US FOR ANY DAMAGES RESULTING FROM REMOVING THE COAL, FOR $1400.00," AND ASKED QUEALY'S ADVICE ON THE MATTER. ONE WEEK LATER, APPARENTLY PURSUANT TO QUEALY'S SUGGESTION THAT THE SURFACE RIGHTS BE RENTED RATHER THAN SOLD, IRA EXPLAINED:

> THREE OR FOUR YEARS AGO, WHEN I FIRST TRIED TO GET THE COAL RIGHTS TO THIS TRACT, G. T. OLSEN, OF EMERY, WAS ALSO TRYING TO BUY IT FOR THE SURFACE RIGHTS, AND WALKER KEPT RUNNING BETWEEN OLSEN AND MYSELF TRYING TO GET US TO OVERBID ONE ANOTHER, FINALLY OLSEN AND I GOT TOGETHER AND AGREED THAT NEITHER OF US WOULD TALK TO WALKER ABOUT BUYING

> UNTIL HE BECAME MORE REASONABLE, AND IT WAS AT THAT TIME UNDERSTOOD BETWEEN OLSEN AND MYSELF THAT IF EITHER OF US SHOULD BUY I WAS TO HAVE THE COAL RIGHTS AND OLSEN THE SURFACE . . . . NOW SINCE I HAVE BOUGHT, OLSEN INSISTS THAT HE SHOULD HAVE THE PRIVILEGE OF BUYING THE SURFACE FROM ME, BUT I EXPLAINED THAT THE PURCHASE I MADE WAS NOT A PERSONAL ONE, AND THAT I HAVE NOT THE AUTHORITY TO SELL WITHOUT INSTRUCTIONS FROM HIGHER UP. [EMPHASIS ADDED]

THIS LETTER MAKES CLEAR THAT IN THIS PARTICULAR TRANSACTION IRA BROWNING ACTED AS AN AGENT OR EMPLOYEE OF KEMMERER COAL [OR AT LEAST OF P. J. QUEALY] WHEN HE ACQUIRED THE FEE LANDS, AND NOT IN HIS INDIVIDUAL CAPACITY. ANOTHER LETTER, DATED OCTOBER 27, 1926, REVEALS THAT QUEALY THOUGHT THE STATE PATENTS FOR THE FEE LANDS HAD BEEN ISSUED EITHER IN HIS NAME OR IN KEMMERER'S.

IF IT IS CLEAR THAT IRA BROWNING OFTEN ACQUIRED LANDS AND OTHERWISE ACTED ON BEHALF OF KEMMERER COAL AND ITS AFFILIATES, IT IS EQUALLY CLEAR THAT HE WAS SADLY UNDERPAID. THE MINUTES OF A MEETING OF THE BOARD OF TRUSTEES OF KEMMERER COAL REFLECT AN AWARENESS OF THAT FACT, STAT-

ING THAT IRA SHOULD BE GIVEN "A SMALL INTEREST IN THE LANDS OR RECEIVE SOME ADDITIONAL COMPENSATION, TO BE AGREED UPON BETWEEN MR. QUEALY AND MR. BROWNING." IT DOES NOT APPEAR FROM THE RECORD WHAT, IF ANY, ADDITIONAL COMPENSATION WAS EVER AGREED ON.

II. ANALYSIS

A. THE COAL RIGHTS

BOTH PARTIES SEEK SUMMARY JUDGMENT AS TO OWNERSHIP OF THE COAL RIGHTS. STEPHEN L. BROWNING'S CLAIM IS BASED ON THE THEORY THAT AN EXPRESS OR IMPLIED TRUST EXISTS FOR HIS BENEFIT. IF NO SUCH TRUST EXISTS TO VALIDATE THE PLAINTIFF'S CLAIM TO THE COAL RIGHTS AS IRA'S SOLE SURVIVING HEIR, THEN IT IS CLEAR FROM THE RECORD CHAIN OF TITLE THAT GULF IS THE OWNER OF THE PROPERTY. THIS COURT CONCLUDES THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF AN EXPRESS OR IMPLIED TRUST AND THAT SUMMARY JUDGMENT IS APPROPRIATE

QUIETING GULF'S TITLE TO THE COAL RIGHTS.

A RECENT UTAH CASE REITERATED THE PRINCIPLES GOVERNING THE CREATION OF AN EXPRESS TRUST. SUNDQUIST V. SUNDQUIST, 639 P. 2d 181 [UTAH 1981] THE UTAH SUPREME COURT STATED:

> AN INTER VIVOS TRUST IS CREATED WHEN A SETTLOR, WITH INTENT TO CREATE A TRUST, TRANSFERS PROPERTY TO A TRUSTEE IN TRUST FOR, OR DECLARES THAT HE OR SHE [THE SETTLOR] HOLDS SPECIFIC PROPERTY IN TRUST FOR, A NAMED BENEFICIARY. THE SETTLOR NEED NOT SIGN A FORMAL TRUST INSTRUMENT OR EMPLOY ANY PARTICULAR FORM OF WORDS. BUT THE SETTLOR MUST HAVE AN INTENT TO CREATE A PRESENTLY ENFORCEABLE TRUST, THE TRUST PROPERTY MUST BE CLEARLY SPECIFIED AND SET ASIDE, AND THE ESSENTIAL TERMS OF THE TRUST MUST BE CLEAR ENOUGH FOR THE COURT TO ENFORCE THE EQUITABLE DUTIES THAT ARE THE SINE QUA NON OF THE TRUST RELATIONSHIP.

639 P.2d AT 183-84 [CITATIONS OMITTED]. IN THIS CASE, THE ONLY EVIDENCE OF AN EXPRESS TRUST IS THE WORD "TRUSTEE" THAT APPEARS IN EACH DEED. THAT EVIDENCE IS SIMPLY INSUFFICIENT TO MEET THE REQUIREMENTS ARTICULATED ABOVE. THE MOST EGREGIOUS INSUFFICIENCY IS THE COMPLETE LACK OF TERMS ACCORDING TO WHICH THIS COURT COULD ENFORCE A

TRUST. ALTHOUGH THE PROPERTY IS IDENTIFIED, IT IS NOT KNOWN WHETHER THAT PROPERTY WAS TO BE SOLD AND THE PROFITS THEREFROM HELD IN TRUST FOR IRA BROWNING AND HIS FAMILY, OR WAS TO BE DEVELOPED AND THE ROYALTIES THEREFROM PAID TO THE BROWNING FAMILY, OR WAS TO BE HELD INDEFINITELY FOR FUTURE USE AND ENJOYMENT. BECAUSE NO BENEFICIARY IS NAMED, IT IS NOT EVEN KNOWN WHETHER THE BROWNING FAMILY WAS TO BE THE BENEFICIARY OF THE TRUST. THE DURATION OF ANY SUCH TRUST IS LIKEWISE IMPOSSIBLE OF ASCERTAINMENT. IN SHORT, THIS COURT HAS ABSOLUTELY NO BASIS IN THE UNDISPUTED FACTS FOR FINDING AN EXPRESS TRUST IN FAVOR OF THE BROWNING FAMILY, NOR ARE ANY SUCH FACTS LIKELY TO COME TO LIGHT.

THESE DIFFICULTIES AND OTHERS THAT INEVITABLY SURFACE WHERE A TRUST IS SOUGHT IN AN OTHERWISE ABSOLUTE CONVEYANCE OF REAL PROPERTY UNDOUBTEDLY INSPIRED THE CURATIVE STATUTES NOW IN EFFECT IN MANY JURISDICTIONS. THE COURT'S

FINDING THAT THERE IS NO EXPRESS TRUST AFFECTING GULF'S RECORD TITLE TO THE COAL RIGHTS IS FURTHER BOLSTERED BY UTAH'S CURATIVE STATUTE, UTAH CODE ANN. § 57-1-6 [1953]. AS IT APPLIES SPECIFICALLY TO THIS CASE, THAT STATUTE PROVIDES THAT A RECORDED INSTRUMENT THAT MERELY DESIGNATES THE GRANTEE AS A TRUSTEE DOES NOT

> OPERATE TO CHARGE ANY THIRD PERSON WITH NOTICE OF THE INTEREST OF ANY PERSON OR PERSONS NOT NAMED IN SUCH INSTRUMENT OR OF THE GRANTOR OR GRANTORS; BUT THE GRANTEE MAY CONVEY THE FEE OR SUCH LESSER INTEREST AS WAS CONVEYED TO HIM BY SUCH INSTRUMENT FREE AND CLEAR OF ALL CLAIMS NOT DISCLOSED BY THE INSTRUMENT OR BY AN INSTRUMENT RECORDED AS HEREIN PROVIDED SETTING FORTH THE NAMES OF THE BENEFICIARIES, SPECIFYING THE INTEREST CLAIMED AND DESCRIBING THE PROPERTY CHARGED WITH SUCH INTEREST.

THUS EVEN THOUGH THE DEEDS FROM IRA R. BROWNING TO "PATRICK J. QUEALY, TRUSTEE," WERE RECORDED WHEN L. M. PRATT ACQUIRED THE COAL RIGHTS FROM QUEALY'S WIDOW, PRATT WAS ENTITLED UNDER UTAH LAW TO CONVEY THE COAL RIGHTS FREE AND CLEAR OF ANY INTEREST NOT DISCLOSED BY THOSE DEEDS. THE MERE APPELLATION "TRUSTEE" WAS INSUFFICIENT TO

GIVE NOTICE OF ANY SUCH INTERESTS.

NEITHER THE ABSENCE OF AN EXPRESS TRUST NOR THE UTAH CURATIVE STATUTE, HOWEVER, DISPOSES OF THE PLAINTIFF'S CLAIM TO THE COAL RIGHTS ON THE BASIS OF AN IMPLIED CONSTRUCTIVE TRUST. A CONSTRUCTIVE TRUST IS OF COURSE NOT A TRUST AT ALL, BUT RATHER AN EQUITABLE TOOL DESIGNED TO RESTORE PROPERTY TO ITS RIGHTFUL OWNER BY MAKING THE HOLDER OF THE LEGAL TITLE A TRUSTEE WHOSE SOLE DUTY IS TO TRANSFER TITLE AND POSSESSION. SEE BOGERT, THE LAW OF TRUSTS § 77, AT 288-89 [5TH ed. 1973].

A CONSTRUCTIVE TRUST CAN ARISE FROM THE BREACH OF AN EXPRESS ORAL TRUST, AS WHEN A GRANTEE TAKES LEGAL TITLE TO PROPERTY, PROMISING TO HOLD IT IN TRUST FOR THE GRANTOR, BUT THEN CLAIMS THE PROPERTY FOR HIMSELF. IN SOME STATES THE STATUTE OF FRAUDS PREVENTS A COURT FROM IMPRESSING A CONSTRUCTIVE TRUST SOLELY ON THE BASIS OF THE BREACH OF AN ORAL TRUST. IN UTAH,

HOWEVER, THE STATUTE OF FRAUDS DOES NOT APPLY TO CONSTRUCTIVE TRUSTS. UTAH CODE ANN. §25-5-2 [1953]. IF THE PUTATIVE BENEFICIARY CAN SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE GRANTEE ORALLY PROMISED TO HOLD THE PROPERTY IN TRUST, THE UTAH COURTS ARE WILLING TO MAKE THE GRANTEE A CONSTRUCTIVE TRUSTEE. SEE, e.g., CARNESECCA V. CARNESECCA, 572 P. 2d 708, 710 [UTAH 1977] [EQUITY WILL IMPRESS A CONSTRUCTIVE TRUST UPON PROPERTY IN FAVOR OF A BENEFICIARY OF AN ORAL TRUST UNDER CERTAIN CIRCUMSTANCES AND NO WRITING EVIDENCING AN INTENTION TO CREATE A TRUST IS REQUIRED"].

A CONSTRUCTIVE TRUST CAN ALSO ARISE WHERE NO EXPRESS ORAL TRUST IS INVOLVED BUT WHERE PROPERTY IS OBTAINED OR RETAINED BY FRAUDULENT OR UNCONSCIONABLE CONDUCT. AGAIN, HOWEVER, BECAUSE PAROL EVIDENCE IS ADMITTED IN DEROGATION OF A DEED ABSOLUTE ON ITS FACE, SUCH EVIDENCE MUST BE CLEAR AND CONVINCING. Id. MINDFUL OF

THAT HEAVY BURDEN OF PROOF AND OF THE CAVEAT THAT THE EVIDENCE IN CASES SUCH AS THIS MUST BE SCRUTINIZED WITH ABUNDANT CAUTION, SEE NIELSON V. RASMUSSEN, 558 P. 2d 511, 513 [UTAH 1976], THIS COURT NOW TURNS TO AN EXAMINATION OF THE AVAILABLE FACTS.

THE PLAINTIFF OFFERS SEVERAL FACTS WHICH HE CLAIMS PROVE THAT THE DEFENDANT GULF NOW HOLDS THE COAL RIGHTS WRONGFULLY AND THEREFORE HE IS ENTITLED TO THE RECONVEYANCE OF THOSE RIGHTS UNDER A CONSTRUCTIVE TRUST. FIRST, THE PLAINTIFF POINTS OUT THAT THERE IS NO EVIDENCE OF WHO ORIGINALLY PAID FOR THE COAL RIGHTS AND THAT THE DEEDS FROM IRA BROWNING TO P. J. QUEALY MERELY RECITE A NOMINAL CONSIDERATION. THOSE FACTS ARE IRRELEVANT TO THE EXISTENCE OF A CONSTRUCTIVE TRUST.[4] GULF DOES NOT CLAIM THAT

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4. THE PLAINTIFF MAY BE ATTEMPTING TO SHOW A RESULTING TRUST, RATHER THAN A CONSTRUCTIVE TRUST, ON THE GROUNDS THAT IRA BROWNING PAID

QUEALY OR KEMMERER COAL ACTUALLY PROVIDED THE CONSIDERATION FOR IRA'S INITIAL ACQUISITION OF THE COAL RIGHTS, ALTHOUGH THERE IS EVIDENCE THAT THEY DID SO IN CONNECTION WITH OTHER LANDS. THERE IS NO EVIDENCE, BEYOND THE UNREMARKABLE FACT THAT THE DEED RECITES MERELY NOMINAL CONSIDERATION, THAT P. J. QUEALY DID NOT GIVE FULL AND ADEQUATE CONSIDERATION FOR THE CONVEYANCE. ACCORDING TO UTAH LAW, THE FACT THAT AN ABSOLUTE DEED RECITES NOMINAL CONSIDERATION CANNOT CREATE OR GIVE NOTICE OF ANY INTEREST NOT APPARENT ON THE FACE OF THE DEED. UTAH CODE ANN. § 57-1-6 [1953].

SECOND, THE PLAINTIFF AGAIN RELIES ON THE WORD "TRUSTEE" IN THE DEEDS. THIS APPEARS TO BE A CLAIM THAT THERE WAS AN EXPRESS ORAL TRUST, I.E. A PROMISE BY P. J. QUEALY TO HOLD THE COAL

FOR REAL PROPERTY THE TITLE TO WHICH STANDS IN THE NAME OF ANOTHER. THIS IS THE BASIS FOR A RESULTING TRUST. SEE THE DISCUSSION OF RESULTING TRUSTS IN SECTION II B., infra. NEITHER THE LAW NOR THE FACTS WOULD SUPPORT SUCH A CLAIM.

RIGHTS FOR THE BENEFIT OF IRA OR HIS FAMILY, EVIDENCED IN THE DEED BY THIS SHORTHAND REFERENCE. FOR MANY OF THE SAME REASONS THAT THE WORD "TRUSTEE" IN A DEED IS INSUFFICIENT TO CREATE AN EXPRESS WRITTEN TRUST, IT IS ALSO INSUFFICIENT, STANDING ALONE, TO EVIDENCE AN EXPRESS ORAL TRUST. THE PLAINTIFF HAS INTRODUCED NO INDEPENDENT EVIDENCE OF AN ORAL TRUST TO BOLSTER THE WORD "TRUSTEE" IN THE DEED, NOR DOES IT APPEAR THAT CLEAR AND CONVINCING EVIDENCE TO THAT EFFECT COULD POSSIBLY BE ADDUCED. IN SUCH CIRCUMSTANCES THIS COURT SIMPLY HAS NO BASIS TO IMPLY A TRUST ON THE GROUNDS OF BREACH OF AN EXPRESS ORAL TRUST.

THIRD, THE PLAINTIFF'S CLAIM THAT TITLE "PASSED DEVIOUSLY" TO KEMMERER COAL, THAT KEMMERER COAL "CONCEALED" FACTS AND EVENTS FROM THE BROWNINGS, AND THAT KEMMERER COAL NEVER REFUTED MAY BROWNING'S CLAIMED INTERESTS IN UNIDENTIFIED "COAL LANDS" ASSERTED IN THE LETTERS

DISCUSSED ABOVE, APPARENTLY CONSTITUTE AN ATTEMPT TO SHOW THAT KEMMERER COAL ENGAGED IN A COURSE OF DECEIT, CONCEALMENT AND OTHER FRAUDULENT CONDUCT AND AS A RESULT WRONGFULLY APPROPRIATED THE COAL RIGHTS WHEN IT KNEW THAT IRA INTENDED THEM TO BE HELD IN TRUST FOR HIS FAMILY. SUCH A CLAIM MIGHT BE HELD TO ESTABLISH THE EQUITABLE BASIS FOR THIS COURT'S IMPRESSING A CONSTRUCTIVE TRUST AS TO THE COAL RIGHTS IF SUPPORTED BY ADEQUATE FACTS. SEE, e.g., CARNESECCA, 572 P. 2d AT 710 ["THE USUAL CIRCUMSTANCES WHICH GIVE RISE TO A CONSTRUCTIVE TRUST WOULD INVOLVE ONE UNJUSTLY PROFITING THROUGH GRAUD OR THE VIOLATION OF A DUTY IMPOSED UNDER A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP"].

AS NOTED AT THE OUTSET, THE RECORD IN A CASE SUCH AS THIS CAN NEVER BE COMPLETE, BUT SUCH MATERIAL FACTS AS ARE BEFORE THE COURT AND UNDISPUTED DO NOT SUPPORT THE PLAINTIFF'S CLAIMS OF FRAUD AND CONCEALMENT. WHILE THIS COURT IS

SOMEWHAT TROUBLED BY DOCUMENTS IN THE RECORD WHICH INDICATE THAT IRA BROWNING DID INDEED OWN COAL RIGHTS OR OTHER PROPERTIES IN HIS OWN RIGHT THAT WERE NOT IDENTIFIED IN THE DECREE DISTRIBUTING HIS ESTATE, THOSE DOCUMENTS SIMPLY DO NOT PROVIDE ADEQUATE SUPPORT FOR THE PLAINTIFF'S OTHERWISE UNSUBSTANTIATED CLAIMS THAT HE IS ENTITLED UNDER THE RESIDUARY CLAUSE TO OWNERSHIP OF THE SPECIFIC COAL RIGHTS INVOLVED HERE. THE DOCUMENTS, WITH ONE EXCEPTION, NEVER SPECIFICALLY IDENTIFY THE BROWNING COAL LANDS AS INCLUDING THE COAL RIGHTS AT ISSUE IN THIS CASE. AND WHILE THE SAN RAFAEL MINUTES DISCUSSED ABOVE SUGGEST THAT THE BROWNINGS MAY HAVE HAD AN INTEREST IN A PORTION OF THE COAL RIGHTS AFTER THEY HAD DEEDED THOSE RIGHTS TO QUEALY, THAT INTEREST WAS IN ALL LIKELIHOOD LIMITED TO THE RECORD TITLE THAT THE DEFENDANTS FREELY ADMIT THAT BROWNINGS HELD UNTIL 1949.

THE DEPOSITION TESTIMONY OF FRANCES

WANAMAKER, THE PLAINTIFF'S MOTHER, IS ALSO TROUBLING BECAUSE IT REFLECTS THE BROWNING FAMILY'S UNDERSTANDING THAT P. J. QUEALY HAD SOMETHING TO DO WITH SOME LANDS HELD IN TRUST FOR THEM. AGAIN, HOWEVER, MRS. WANAMAKER SHOWED A COMPLETE INABILITY TO IDENTIFY THE LANDS ALLEGEDLY HELD IN TRUST. BECAUSE IRA BROWNING ACQUIRED A GREAT DEAL OF LAND IN CONJUNCTION WITH QUEALY, THE TRUST RES MIGHT HAVE COMPRISED ANY NUMBER OF TRACTS. THIS COURT SIMPLY CANNOT IMPRESS A CONSTRUCTIVE TRUST ON THE COAL RIGHTS WITHOUT ANY SPECIFIC EVIDENCE IN THE RECORD TO SUPPORT SUCH A FINDING.

FINALLY, THE PLAINTIFF ARGUES THAT BECAUSE THE DEFENDANTS' PREDECESSORS IN INTEREST DID NOT ASSERT ANY CLAIM AGAINST IRA BROWNING'S ESTATE, EVEN THOUGH THEY OBVIOUSLY KNEW THAT HE WAS THE RECORD OWNER OF THE COAL RIGHTS UNTIL 1949 WHEN THE DEEDS FROM IRA TO P. J. QUEALY WERE RECORDED, THE DEFENDANTS ARE BARRED BY THE STATUTE OF LI-

MITATIONS OR OTHERWISE ESTOPPED FROM NOW ASSERTING TITLE. APPARENTLY THE PLAINTIFF CLAIMS THAT SOMEONE SHOULD HAVE ASSERTED IN THE PROBATE PROCEEDING THAT THE COAL RIGHTS WERE NOT ASSETS OF IRA'S ESTATE. IF THE COAL RIGHTS HAD BEEN SPECIFICALLY LISTED AMONG THE ASSETS, THE DEFENDANTS' PREDECESSORS MIGHT HAVE BEEN EXPECTED TO MAKE SUCH AN ASSERTION. THE COAL RIGHTS WERE NOT SPECIFICALLY DISTRIBUTED UNDER THE PROBATE PROCEEDINGS; THEREFORE, THE DEFENDANTS HAD NO REASON TO ASSERT THEIR CLAIM IN THOSE PROCEEDINGS. IN ANY EVENT, THE UTAH STATUTE OF LIMITATIONS DOES NOT BAR A CLAIM FOR THE ENFORCEMENT OF A SPECIFIC INTEREST IN PROPERTY SUCH AS THE DEFENDANTS MAKE HERE. SEE IN RE ESTATE OF SHARP, 537 P. 2d 1034 [UTAH 1975].

THE COURT CONCLUDES THAT NO CONSTRUCTIVE TRUST COULD POSSIBLY BE HELD TO ARISE IN THIS CASE. IT IS EQUALLY CLEAR, AS SHOWN ABOVE, THAT NO EXPRESS TRUST EXISTS WITH RESPECT TO THE COAL

RIGHTS. ACCORDINGLY, THE DEFENDANT GULF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW QUIETING ITS TITLE TO THE COAL RIGHTS.

B. THE FEE LANDS

BOTH PARTIES ALSO SEEK SUMMARY JUDGMENT ON THE QUESTION OF THE OWNERSHIP OF THE FEE LANDS. THE DEFENDANTS' CLAIM IS BASED ON THE THEORY THAT THEIR PREDECESSOR IN INTEREST, KEMMERER COAL, WAS THE BENEFICIARY OF A PURCHASE MONEY RESULTING TRUST OVER THE FEE LANDS BECAUSE OF KEMMERER'S PAYMENT OF THE PURCHASE PRICE FOR THE LANDS AND THE STATE'S ISSUANCE OF PATENTS IN THE NAME OF IRA R. BROWNING. THE PLAINTIFF'S CLAIM IS BASED ON THE UNBROKEN CHAIN OF RECORD TITLE IN THE NAME OF IRA R. BROWNING SINCE 1914. THE PLAINTIFF FURTHER ASSERTS THAT HIS OWN ACTIONS AS WELL AS ACTIONS OF HIS PREDECESSORS IN DEROGATION OF GULF'S CLAIMS CONSTITUTE A REPUDIATION OF ANY RESULTING TRUST, AND THAT IN ANY

EVENT THE STATUTE OF LIMITATIONS OR THE DOCTRINE OF LACHES BARS GULF'S ELEVENTH-HOUR ATTEMPTS TO ENFORCE A RESULTING TRUST.

A PURCHASE MONEY RESULTING TRUST, LIKE A CONSTRUCTIVE TRUST, IS AN EQUITABLE TOOL USED TO ACCOMPLISH WHAT THE LAW ASSUMES TO BE THE INTENT OF THE PARTIES WHEN ONE PARTY PROVIDES THE CONSIDERATION FOR THE PURCHASE OF REAL PROPERTY IN THE NAME OF ANOTHER. SEE IN RE ESTATE OF HOCK, 655 P.2d 1111, 1114-15 [UTAH 1982] [CITING 5 SCOTT, THE LAW OF TRUSTS § 440.1 [3d ed.1967] AND THE RESTATEMENT [SECOND] OF TRUSTS § 440 [1959]). THE MERE FACT THAT ONE PARTY PAID THE PURCHASE PRICE FOR PROPERTY AND ANOTHER PARTY WAS GIVEN LEGAL TITLE RAISES A PRESUMPTION THAT A TRUST WAS INTENDED FOR THE BENEFIT OF THE FIRST PARTY. ESTATE OF HOCK, 655 P.2d at 1115 [QUOTING SCOTT, THE LAW OF TRUSTS § 440 [3d ed 1967]). THE PRESUMPTION CAN BE REBUTTED IF THE TRANSFER WAS TO ONE IN A CONFIDENTIAL RELATIONSHIP, SUCH

AS A FAMILY MEMBER, OR UNDER OTHER CIRCUMSTANCES THAT MIGHT INDICATE A GIFT RATHER THAN A TRUST WAS INTENDED. SEE RESTATEMENT [SECOND] OF TRUSTS §§ 442, 443 [1959]. ON THE OTHER HAND THE PUTATIVE BENEFICIARY'S USE AND ENJOYMENT OF THE PROPERTY, HIS PAYMENT OF TAXUS AND HIS STATUS AS PRINCIPAL OR EMPLOYER OF THE GRANTEE CORROBORATE THE PRESUMPTION OF TRUST INTENT. SEE BOGERT, THE LAW OF TRUSTS § 74 at 269 [5th ed. 1973]. BECAUSE IT IS USUALLY A CLAIM IN DEROGATION OF CLEAR RECORD TITLE, A RESULTING TRUST MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE. SEE ESTATE OF HOCK, 655 P.2d at 1114.

APPLYING THOSE PRINCIPLES TO THE UNDISPUTED FACTS DETAILED ABOVE, THE INESCAPABLE CONCLUSION IS THAT A PURCHASE MONEY RESULTING TRUST MUST BE IMPRESSED ON THE FEE LANDS IN FAVOR OF GULF AS SUCCESSOR IN INTEREST TO THE ORIGINAL BENEFICIAL PURCHASER OF THOSE LANDS. THE ACCOUNTING ENTRIES AND LETTERS ESTABLISH BEYOND DOUBT THAT KEMMERER

COAL INSTRUCTED IRA BROWNING TO PURCHASE THE FEE LANDS ON ITS BEHALF AND REIMBURSED HIM FOR THAT PURPOSE; IRA BROWNING UNDERSTOOD THAT THE PURCHASE WAS NOT A PERSONAL ONE AND THAT HE HAD TO HAVE PERMISSION TO SELL THE SURFACE RIGHTS. THE PLAINTIFF TRIES TO SUGGEST A FACT ISSUE THAT THE FUNDS ADVANCED BY KEMMERER FOR THE LAND PURCHASE COULD HAVE BEEN IN REPAYMENT OF A DEBT DUE IRA OR A PAYMENT FOR IRA'S CONSIDERABLE BUT LARGELY UNREWARDED SERVICES AS AN AGENT OR EMPLOYEE, BUT THE FACTS SIMPLY DO NOT CREATE SUCH AN ISSUE. FURTHER, THE DEFENDANTS DEFINITELY PAID TAXES ON THE PROPERTY FOR A NUMBER OF YEARS, BUT THERE IS NO EVIDENCE THAT THE PLAINTIFF OR HIS PREDECESSORS EVER PAID THE TAXES BEFORE 1983, WHEN HE DECIDED TO ASSERT AN OWNERSHIP INTEREST IN THE LANDS. FINALLY, KEMMERER COAL WAS ALSO IRA'S PRINCIPAL OR EMPLOYER. IN SUCH CIRCUMSTANCES THIS COURT FINDS A RESULTING TRUST AS A MATTER OF LAW.

THE PLAINTIFF CLAIMS THAT EVEN IF THE FEE LANDS WERE ONCE SUBJECT TO A RESULTING TRUST IN FAVOR OF KEMMERER, THE DEFENDANTS HERE CANNOT NOW SEEK TO ENFORCE THAT TRUST IN THEIR FAVOR BUT SHOULD BE ESTOPPED OR BARRED. THE SUCCESS OF THIS DEFENSE RESTS ENTIRELY ON WHETHER THE PLAINTIFF OR HIS PREDECESSORS IN INTEREST EVER REPUDIATED THE RESULTING TRUST, FOR IT IS WELL SETTLED THAT SUCH A DEFENSE IS NOT AVAILABLE UNLESS THERE HAS BEEN A CLEAR REPUDIATION CHARGING THE TRUST BENEFICIARIES WITH KNOWLEDGE THAT SOME ACTION IS REQUIRED TO ENFORCE THE TRUST. SEE WALKER V. WALKER, 17 UTAH 2d 53, 404 P. 2d 253, 257 [1965]. THE MERE PASSAGE OF TIME, WHILE PERHAPS RELEVANT TO THE EQUITABLE DOCTRINE OF LACHES, DOES NOT EFFECT A REPUDIATION, SEE RESTATEMENT [SECOND] OF THE LAW OF TRUSTS §409 [1959], NOR CAN INACTION BY THE PUTATIVE TRUSTEE EFFECT A REPUDIATION WHEN NO TRUST DUTIES ARE EXPLICIT.

THE PLAINTIFF POINTS TO SEVERAL FACTS OF WHICH THE DEFENDANTS OR THEIR PREDECESSORS WERE AWARE THAT HE CLAIMS ARE INCONSISTENT WITH THE EXISTENCE OF A TRUST AND THEREFORE CONSTITUTE A REPUDIATION. MOST OF THOSE FACTS, HOWEVER, EITHER ARE IRRELEVANT OR CUT DIRECTLY AGAINST THE PLAINTIFF'S POSITION. FOR EXAMPLE, THE FACT THAT NEITHER IRA BROWNING NOR ANYONE IN HIS FAMILY EVER CONVEYED THE FEE LANDS IS PERFECTLY CONSISTENT WITH THE CONCLUSION THAT SUCH LANDS WERE NOT IRA'S TO CONVEY. SIMILARLY, IRA BROWNING'S DEATH AND THE SUBSEQUENT PROBATE PROCEEDINGS DID NOT CONSTITUTE A REPUDIATION. IF ANYTHING, THE FACT THAT THE FEE LANDS WERE NOT LISTED IN THE ORDER EVEN THOUGH THEY STOOD IN IRA'S NAME SUPPORTS A CONCLUSION THAT THOSE LANDS WERE NOT IRA'S. FINALLY, THE LETTERS THAT SPEAK OF A DESIRE TO CONVERT UNIDENTIFIED COAL LANDS TO CASH SURELY DO NOT AMOUNT TO AN UNEQUIVOCAL REPUDIATION THAT WOULD PUT THE DEFENDANTS ON

NOTICE THAT THE BROWNINGS CLAIMED OUTRIGHT OWNERSHIP OF THE FEE LANDS AT ISSUE HERE.[5]

COMMON SENSE DICTATES THAT WHEN THE TRUST ASSERTED IS A RESULTING TRUST RATHER THAN AN EXPRESS TRUST, AS A PRACTICAL MATTER THE ONLY ACTS THAT WOULD CONSTITUTE REPUDIATION WOULD BE ACTS WHOLLY INCONSISTENT WITH THE BENEFICIARY'S INTEREST, SUCH AS POSSESSION AGAINST THE GRANTOR'S WILL OR ASSERTION OF OUTRIGHT OWNERSHIP. THIS IS SO BECAUSE OF THE COMPLETE LACK OF TRUST DUTIES, THE BREACH OF WHICH WOULD OTHERWISE CONSTITUTE A REPUDIATION. IN THIS CASE THE DEFENDANTS AND THEIR PREDECESSORS IN INTEREST UNDER-

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[5]INCIDENTALLY, IT APPEARS THAT PLAINTIFF, PERHAPS UNWITTINGLY, SEEKS TO PROVE TOO MUCH FROM HIS GRANDMOTHER'S LETTERS. HE POINTS TO THEM AS EVIDENCE THAT BOTH THE COAL RIGHTS AND THE FEE LANDS WERE AMONG THE PROPERTY PASSED TO HIM UNDER THE RESIDUARY CLAUSE OF HIS GRANDFATHER'S PROBATE DECREE. THE VERY FACT THAT THE LETTERS CAN BE READ TO REFER TO TWO COMPLETELY DIFFERENT TRACTS OF LAND--INDEED TWO ENTIRELY DIFFERENT TRANSACTIONS--BELIES THEIR USEFULNESS AS REPUDIATIONS AND AS SPECIFIC EVIDENCE TO SUPPORT THE PLAINTIFF'S CONTENTIONS.

TOOK NO SUCH ACT FOR NEARLY 70 YEARS. OF COURSE, THE PLAINTIFF CLAIMS THAT THE BROWNINGS DID NOT EVEN KNOW OF THEIR RECORD OWNERSHIP UNTIL 1983. THAT FACT, HOWEVER, IS IRRELEVANT TO THE ISSUE OF REPUDIATION; WHILE IT MIGHT EXCUSE THE PLAINTIFF'S FAILURE TO BRING THIS ACTION, IT DOES NOT SUPPLY THE DEFECT OF NOTICE OF REPUDIATION. THE ONLY CLEAR ACT OF REPUDIATION IS PLAINTIFF'S FILING THIS LAWSUIT, AND THERE CAN BE NO CONTENTION THAT THE DEFENDANTS DID NOT TIMELY RESPOND THERETO.

BOTH PARTIES SEEK TO INVOKE THE EQUITABLE DOCTRINE OF LACHES TO PREVENT THE OTHER FROM ASSERTING ITS CLAIMS TO THE PROPERTIES IN QUESTION HERE. THE PLAINTIFF'S RELIANCE ON LACHES SEEMS ENTIRELY MISPLACED, FOR IF THIS COURT WERE TO WEIGH THE EQUITIES IN THIS CASE THE BALANCE WOULD PREPONDERATE IN FAVOR OF THE DEFENDANTS. BOTH PARTIES UNDENIABLY ARE DEPRIVED OF WITNESSES AND DOCUMENTS SOLELY BY THE PASSAGE OF TIME,

BUT NEITHER IS GUILTY OF THE INEXCUSABLE DELAY THAT THE DOCTRINE OF LACHES ABHORS. THE DEFENDANTS HAVE EXPENDED UNTOLD SUMS OVER DECADES OF QUIET ENJOYMENT TO IMPROVE AND DEVELOP THE LANDS THAT THE PLAINTIFF NOW CLAIMS BELONG TO HIM. THE PROPERTY HAS APPRECIATED ASTRONOMICALLY. THIRD PARTIES IGNORANT OF THE ORIGINAL TRANSACTIONS NOW SEE THEIR RIGHTS THREATENED IN WAYS THEY COULD NOT HAVE ANTICIPATED.

ACCORDINGLY, THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS DENIED AND THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ARE GRANTED QUIETING TITLE TO BOTH THE COAL RIGHTS AND THE FEE LANDS IN THE DEFENDANT GULF OIL CORPORATION IN ACCORDANCE WITH ITS COUNTERCLAIM. THE PLAINTIFF HEREIN SHALL TAKE NOTHING BY THIS ACTION. EACH PARTY SHALL BEAR ITS COSTS AND FEES. THE DEFENDANTS ARE TO PREPARE AND SUBMIT A PROPOSED FORM OF JUDGMENT, INCLUDING A SPECIFIC LEGAL DESCRIPTION OF THE PROPERTY INTERESTS AFFECTED BY SUCH

JUDGMENT, AND DO SO WITHIN 10 DAYS.

DATED THIS 27TH DAY OF NOVEMBER 1985.

BY THE COURT

/S/ BRUCE JENKINS

COPIES MAILED TO COUNSEL 11/27/85 mw
RUSSELL A. CANNON, ESQ.
CLARON C. SPENCER, ESQ.
KEITH E. TAYLOR, ESQ.
KENT R. OLSON, ESQ.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* *

STEPHEN L. BROWNING,

PLAINTIFF,

VS.

CHEVRON U.S.A., INC, f/k/a GULF OIL CORPORATION, ET AL.,

DEFENDANTS.

C-83-0772J

JUDGMENT

* *

THIS MATTER CAME BEFORE THE COURT ON THE MOTIONS OF THE PARTIES FOR SUMMARY JUDGMENT. BY A MEMORANDUM OPINION AND ORDER DATED NOVEMBER 27, 1985, THE COURT DENIED THE PLAINTIFF'S MOTION AND GRANTED THE DEFENDANTS' MOTIONS. THE COURT REQUESTED THAT COUNSEL FOR DEFENDANTS PREPARE AND SUBMIT A PROPOSED FORM OF JUDGMENT SPECIFICALLY DESCRIBING THE COAL RIGHTS AND LANDS

AT ISSUE, WHICH FORM OF JUDGMENT, APPROVED BY ALL THE PARTIES, THE COURT RECEIVED ON JUNE 6, 1986.

ON APRIL 11, 1986, THE PLAINTIFF MOVED FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b), F.R. Civ. P. HAVING CONSIDERED THE SAME, THE COURT HEREBY DENIES THE MOTION. NOW, THEREFORE, IN DISPOSING OF THIS ACTION BY WAY OF JUDGMENT AS TO ALL OF THE PARTIES AND THEIR CLAIMS HEREIN INCLUDING THOSE TO COAL RIGHTS AND LANDS AT ISSUE, IT IS HEREBY

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. PURSUANT TO A MOTION TO WITHDRAW DATED MARCH 7, 1986, GOOD CAUSE APPEARING THEREFOR, RUSSELL A. CANNON IS HEREBY ALLOWED TO WITHDRAW AS ATTORNEY FOR THE PLAINTIFF. THIS WITHDRAWAL SHALL NOT AFFECT HAROLD N. WILKINSON, WHO SHALL REMAIN AS COUNSEL FOR THE PLAINTIFF.

2. PURSUANT TO THE MEMORANDUM OPINION AND ORDER OF NOVEMBER 27, 1985, THE PLAINTIFF'S

ION FOR SUMMARY JUDGMENT IS DENIED AND THE
ENDANTS' MOTIONS FOR SUMMARY JUDGMENT ARE
NTED.

3. TITLE TO ALL OF THE COAL IN THE FOLLOW-
DESCRIBED LANDS IN EMERY COUNTY, UTAH, IS
EBY QUIETED IN CHEVRON U.S.A., A PENNSYLVA-
CORPORATION, FORMERLY KNOWN AS GULF OIL
PORATION, ITS SUCCESSORS AND ASSIGNS:

TOWNSHIP 22 SOUTH, RANGE 6 EAST, SLM

SECTION 10: SW4, W2SE4, NE4SE4 AND

BEGINNING AT A POINT 80 RODS SOUTH OF THE NORTH QUARTER SECTION CORNER OF SAID SECTION 10 AND RUNNING THENCE SOUTH 50 RODS;
THENCE EAST 160 RODS;
THENCE NORTH 50 RODS;
THENCE WEST 260 RODS TO THE BEGINNING.

COMMENCING AT THE NORTHEAST CORNER OF THE NORTHWEST QUARTER OF SAID SECTION 10 RUNNING THENCE WEST 80 RODS; THENCE SOUTH 38-1/2 RODS; THENCE EAST 80 RODS; THENCE NORTH 38-1/2 RODS TO THE BEGINNING.

ALSO A STRIP OF LAND 6 RODS WIDE BY 40 RODS LONG DUE

BEST AVAILABLE COPY

NORTH AND SOUTH NEXT AND ADJOINING ON THE EAST THE S2 OF THE SW4 OF THE NW4 OF SAID SECTION 10.

SECTION 11: E2SW4, SW4SE4, W2NE4NW4, NW4SW4

SECTION 14: E2NW4, W2NE4, NE4NE4

SECTION 15: S2NE4, NW4NE4, NE4NW4

SECTION 16: NE4NE4 AND BEGINNING 1.09 CHAINS SOUTH OF THE NORTHWEST CORNER OF SAID SECTION 16 RUNNING THENCE SOUTH 62°15' EAST 14.95 CHAINS, THENCE NORTH 8° EAST 1.63 CHAINS; THENCE SOUTH 69°30' EAST 24.54 CHAINS; THENCE SOUTH 18°30' WEST 3.12 CHAINS; THENCE EAST 3.55 CHAINS MORE OR LESS TO THE HALF SECTION LINE; THENCE NORTH ALONG THE HALF SECTION LINE 17.72 CHAINS TO THE NORTHEAST CORNER OF THE NORTHWEST QUARTER OF SAID SECTION; THENCE NORTH 89°37' WEST ALONG THE NORTH LINE OF SAID SECTION 40 CHAINS TO THE NORTHWEST CORNER OF SAID SECTION; THENCE SOUTH ALONG THE WEST LINE OF SAID SECTION 1.09 CHAINS TO THE BEGINNING.

SECTION 17: SW4NE4

SECTION 19: SW4SE4

SECTION 21: SE4NE4

SECTION 22: E2NW4

SECTION 23: N2SW4, W2NE4, S2NW4

SECTION 27: NE4

SECTION 30: N2NE4, NE4SW4 (LOT 2) SW4NW4

SECTION 31: E2SE4

SECTION 32: SW4

TOWNSHIP 23 SOUTH, RANGE 6 EAST, SLM

SECTION 5: NW4NW4 (LOT 4)

SECTION 6: NE4NE4 (LOT 1)

4. TITLE TO AN UNDIVIDED ONE-FOURTH INTEREST IN THE COAL IN THE FOLLOWING DESCRIBED LANDS IN EMERY COUNTY, UTAH, IS HEREBY QUIETED IN CHEVRON U.S.A., INC., A PENNSYLVANIA CORPORATION, FORMERLY KNOWN AS GULF OIL CORPORATION, ITS SUCCESSORS AND ASSIGNS:

TOWNSHIP 22 SOUTH, RANGE 6 EAST, SLM

SECTION 17: SE4NE4, NE4SE4

5. TITLE TO THE ENTIRE FEE SIMPLE MINERAL AND SURFACE INTEREST IN THE FOLLOWING DESCRIBED

LANDS IN EMERY COUNTY, UTAH, INCLUDING ALL OF THE COAL THEREIN, BE AND IS HEREBY QUIETED IN CHEVRON U.S.A. INC., A PENNSYLVANIA CORPORATION, FORMERLY KNOWN AS GULF OIL CORPORATION, ITS SUCCESSORS AND ASSIGNS:

TOWNSHIP 22 SOUTH, RANGE 6EAST, SLM

SECTION 31: SW4NW4, W2SW4 (LOTS 3 AND 4) SW4SE4

TOWNSHIP 23 SOUTH, RANGE 6 EAST, SLM

SECTION 6: NW4NE4 (LOT 2), NE4NW4 (LOT 3), NW4NW4 (LOT 4), SE4NW4

6. THE PLAINTIFF IS WITHOUT ANY RIGHT, TITLE OR INTEREST WHATSOEVER IN THE COAL DESCRIBED IN PARAGRAPHS 3 AND 4 HEREOF AND IN THE LANDS, INCLUDING THE COAL, DESCRIBED IN PARAGRAPH 5 HEREOF.

7. THE PLAINTIFF SHALL TAKE NOTHING BY THIS ACTION.

8. EACH PARTY SHALL BEAR ITS COSTS AND FEES.

DATED THIS 9TH DAY OF JUNE, 1986.

BY THE COURT

/S/ BRUCE S. JENKINS,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

COPIES MAILED TO COUNSEL 6/LO/86: mw

Russell A. Cannon, Esq.
Claron C. Spencer, Esq.
Keith E. Taylor, Esq.
Kent R. Olson, Esq.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEPHEN L. BROWNING,	*	
PLAINTIFF-APPELLANT,	*	NO. 86-2000
V.	*	(D.C.NO. C-83-0772J)
CHEVRON USA, FORMERLY KNOWN AS GULF OIL CORPORATION; GULF MINERAL RESOURCES CORPORATION, A DELAWARE CORPORATION, CONSOLIDATION COAL COMPANY, A PENNSYLVANIA CORPORATION; CONSOLIDATION COAL COMPANY, A DELAWARE CORPORATION; PITTSBURG & MIDWAY COAL MINING COMPANY, A MISSOURI CORPORATION,	*	(D. UTAH)
DEFENDANTS-APPELLEES.	*	

ORDER AND JUDGMENT

FILED UNITED STATES COURT OF APPEALS
TENTH CIRCUIT - AUG 28, 1987
ROBERT L. HOECKER, CLERK

BEFORE MOORE AND SETH, CIRCUIT JUDGES, AND ALLEY, DISTRICT JUDGE*

---

*THE HONORABLE WAYNE E. ALLEY, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, SITTING BY DESIGNATION.

AFTER EXAMINING THE BRIEFS AND THE APPELATE RECORD, THIS THREE-JUDGE PANEL HAS DETERMINED UNANIMOUSLY THAT ORAL ARGUMENT WOULD NOT BE OF MATERIAL ASSISTANCE IN THE DETERMINATION OF THIS APPEAL. SEE FED. R. APP. P34(a); 10th Cir R. 34.1.8(c) and 27.1.2. THE CAUSE IS THEREFORE ORDERED SUBMITTED WITHOUT ORAL ARGUMENT.

THIS IS AN APPEAL FROM AN ORDER TO THE DISTRICT COURT GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

PLAINTIFF COMMENCED THIS DIVERSITY ACTION TO QUIET TITLE IN VARIOUS COAL RIGHTS AND FEE LANDS LOCATED IN EMERY COUNTY, UTAH. THE DISTRICT COURT HELD THAT THERE WERE NO COAL RIGHTS THAT RESULTED FROM EITHER AN EXPRESS, CONSTRUC-

TIVE, OR PURCHASE MONEY RESULTING TRUST BUT RATHER THE COAL RIGHTS WERE OWNED BY DEFENDANT, CHEVRON USA. THE DISTRICT COURT ALSO HELD THAT THE FEE LANDS WERE THE RESULT OF A PURCHASE MONEY RESULTING TRUST IN FAVOR OF KEMMERER COAL, THE PREDECESSOR IN INTEREST OF DEFENDANTS.

SUMMARY JUDGMENT SHALL ONLY BE GRANTED "IF THE PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES, AND ADMISSIONS ON FILE, TOGETHER WITH THE AFFIDAVITS, IF ANY, SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW." FED. R. CIV. P. 56(c).

UPON REVIEW, WE HOLD THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THE DISTRICT COURT CORRECTLY APPLIED THE CONTROLLING LAW. PLAINTIFF'S ARGUMENTS ON APPEAL ARE WITHOUT MERIT.

FOR SUBSTANTIALLY THE REASONS STATED IN THE DISTRICT COURT'S MEMORANDUM OPINION AND ORDER

THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH IS AFFIRMED.

THE MANDATE SHALL ISSUE FORTHWITH.

ENTERED FOR THE COURT
PER CURIAM

SEPTEMBER TERM - OCTOBER 27, 1987.

BEFORE HONORABLE JOHN P. MOORE AND HONORABLE OLIVER SETH, CIRCUIT JUDGES, UNITED STATES COURT OF APPEALS, AND HONORABLE WAYNE E. ALLEY, DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA*

STEPHEN L. BROWNING,	)	
	)	
PLAINTIFF-APPELLANT,	)	
	)	
V.	)	
	)	
CHEVRON USA, FORMERLY KNOWN AS GULF OIL CORPORATION, A PENNSYLVANIA CORPORATION; GULF MINERAL RESOURCES CORPORATION, A DELAWARE CORPORATION; CONSOLIDATION COAL COMPANY, A PENNSYLVANIA CORPORATION; CONSOLIDATION COAL COMPANY, A DELAWARE CORPORATION; PITTSBURG & MIDWAY COAL MINING COMPANY, A MISSOURI CORPORATION,	)	NO. 86-2000
	)	
DEFENDANTS-APPELLEES.	)	

THIS MATTER IS BEFORE THE COURT ON APPELLANT'S PETITION FOR REHEARING.

THE MATERIALS SUBMITTED BY APPELLANT HAVE

*THE HONORABLE WAYNE E. ALLEY, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, SITTING BY DESIGNATION.

BEEN REVIEWED BY THE MEMBERS OF THE HEARING PANEL, WHO CONCLUDE THAT THE ORIGINAL DISPOSITION WAS CORRECT. ACCORDINGLY, THE PETITION IS DENIED ON THE MERITS.

/S/ ROBERT K, HOECKER
CLERK

IN RE ESTATE OF SHARP 537 P.2d 1034. THE COURT BELOW DISPOSED OF TWO PARCELS OF REAL PROPERTY INVOLVED IN THE ESTATE OF EDWARD W. SHARP, DECEASED. ON APPEAL IS THE JUDGMENT OF THE COURT, CHALLENGED BY ONE OF THE DAUGHTERS OF THE DECEASED, MRS. FLORENCE POWELL. STATUTORY REFERENCES ARE TO U.C.A.1953, AS AMENDED.

MRS. ETHEL THOMPSON, ANOTHER DAUGHTER OF THE DECEASED, FILED A PETITION WITH THE COURT CLAIMING PURCHASE FROM HER DECEASED FATHER, AND ADDUCED EVIDENCE WHICH, IN THE COURT'S MIND, SUSTAINED HER PETITION; AND THE COURT ORDERED CONVEYANCE. MRS. LOUISE BLANCH, ANOTHER DAUGHTER OF THE DECEASED, PRIOR TO HER DEATH HAD FILED WITH THE COURT HER PETITION CLAIMING CONVEYANCE FROM HER FATHER OF THE SECOND PARCEL OF REALTY HERE UNDER CONSIDERATION. THE ESTATE OF MRS. BLANCH IS CURRENTLY IN PROBATE. MRS. FLORENCE POWELL, (THE OCCUPANT OF THE BLANCH

PARCEL SINCE 1961, MAKING SUBSTANTIAL ALTERATIONS AND REPAIRS) CLAIMING AS THE SUCCESSOR IN INTEREST TO MRS. BLANCH, ALSO FILED A PETITION WITH THE COURT REQUESTING CONVEYANCE TO HER OF THE SEVEN-TENTHS ACRE COMPRISING THE BLANCH PARCEL. THE COURT DENIED THE PETITIONS OF MRS. BLANCH AND MRS. POWELL, THUS REMITTING THE SEVEN-TENTHS ACRE TO THE ESTATE AS AN ASSET.

MRS. POWELL HEREAFTER ALSO APPELLANT, SEEKS REVERSAL OF THE LOWER COURT'S JUDGMENT DISPOSING OF BOTH PARCELS; AND ASSIGNS THREE POINTS OF ERROR. THESE WILL BE TREATED IN THE ORDER GIVEN THEM BY APPELLANT.

APPELLANT CONTENDS THAT THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE BARRED BY 78-24-2(3), THE "DEAD MAN'S" STATUTE; AND CLAIMS THAT WITHOUT THIS INADMISSIBLE TESTIMONY THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE COURT'S FINDINGS. THE TESTIMONY OBJECTED TO CONCERNED THE

TRANSACTION WHEREIN MRS. ETHEL THOMPSON PURCHASED HER PARCEL FROM HER FATHER. FOR TWO REASONS WE CANNOT AGREE WITH APPELLANT'S FIRST ASSIGNMENT OF ERROR.

FIRST, WITNESS FLORENCE POWELL WAS PRESENT AND WITNESSED THE CONTRACT BY WHICH DECEASED SOLD THE PASTURE TO ETHEL THOMPSON. MRS. POWELL ALSO ADMITTED THAT ETHEL THOMPSON HAD ASSUMED THE MORTGAGE, MADE PAYMENTS THEREON, AND HAD PAID THE PROPERTY TAXES. MRS. POWELL FURTHER FURTHER CONCEDED ETHEL THOMPSON'S RIGHTS, UNDER THE CONTRACT, TO PURCHASE THE LAND; AND SEEMED ONLY TO WANT ASSURANCE THAT THE REMAINING PAYMENTS BE MADE.

(1) AS A WITNESS TO THE TRANSACTION CONCERNING ETHEL THOMPSON'S LAND, MRS. POWELL'S TESTIMONY IS ADMISSIBLE TO ESTABLISH THE EXECUTION OF THE CONTRACT, AND THE CIRCUMSTANCES THEN EXTANT. (COOK V. GARDNER 14 UTAH 2d 193,

381 p.2D 78 (1963).

(2) SECONDLY, ALTHOUGH SOME OF THE DETAILS TO WHICH ETHEL THOMPSON TESTIFIED MAY HAVE BEEN INADMISSIBLE UNDER 78-24-2(3), THERE WAS SUBSTANTIAL EVIDENCE TO SUSTAIN THE DETERMINATION OF THE TRIAL COURT. THROUGH DOCUMENTARY EVIDENCE AND EXPERT TESTIMONY THE CONTRACTS OF SALE WERE ESTABLISHED, THE PAYMENTS TO THE DECEDENT WERE PROVED, AS WELL AS THE PAYMENTS TO THE MORTGAGEE, AND THE PAYMENT OF PROPERTY TAXES. IN ADDITION, MRS. THOMPSON'S POSSESSION OF THE PROPERTY FROM THE DATE OF SALE TO THE PRESENT TIME WAS ESTABLISHED. WITH REFERENCE TO THE EFFECT OF TESTIMONY INADMISSIBLE BECAUSE OF THE "DEAD MAN'S" STATUTE SEE DEL PORTO V. NICOLO, 27 UTAH 2d 286, 495 P2d 811 (1971).

APPELLANT'S SECOND ASSIGNMENT OF ERROR CONTENDS THAT THE COURT BELOW ERRED IN TREATING THE PETITIONS OF APPELLANT, AND MRS. THOMPSON,

AS CLAIMS AGAINST THE ESTATE, STATING THAT THE COURT SHOULD HAVE REQUIRED THEM TO FILE SEPARATE ACTIONS AGAINST THE ESTATE. WITH THAT POINT WE ARE IN PARTIAL AGREEMENT.

(3) THE TRIAL COURT DETERMINED THAT THE CLAIM OF MRS. BLANCH (THROUGH WHOM MRS. POWELL CLAIMS) WAS FILED MORE THAN ONE YEAR AFTER THE TIME FOR PRESENTING CLAIMS HAD PASSED, AS FIXED BY THE NOTICE OF CREDITORS. THE PETITION OF LOUISE S. BLANCH (WHICH THE COURT DENOMINATES AS A "CLAIM") ASSERTED THAT THE PROPERTY WAS SOLD TO HER BY EDWARD W. SHARP, AS EVIDENCED BY A WRITTEN DOCUMENT EXECUTED FEBRUARY 17, 1945. IT FURTHER ASSERTED THAT SHE HAD OCCUPIED AND EXERCISED COMPLETE DOMINION OVER THE PREMISES FROM AND AFTER FEBRUARY 17, 1945; AND THAT THE COURT SHOULD ORDER THE ADMINISTRATOR TO EXECUTE AND DELIVER TO HER A SUITABLE CONVEYANCE.

THIS WAS A PETITION FOR SPECIFIC PERFORM-

ANCE OF A CONTRACT TO CONVEY REAL ESTATE, AND FELL SQUARELY WITHIN THE PROVISIONS OF 75-11-26 THE STATUTORY PROVISIONS FOUND IN 75-9-4, CONCERNING CREDITOR'S CLAIMS AND THE TIME LIMITATIONS THEREOF DO NOT APPLY TO A PETITION FOR SPECIFIC PERFORMANCE.

IN BANCROFT'S PROBATE PRACTICE SECOND EDITION, CHAPTER 16, SECTION 772, IT IS SAID:

. . . THAT EQUITABLE CLAIMS FOR RELIEF BEYOND THE MONEY JUDGMENT, SUCH AS FOR ENFORCEMENT OF LIENS OR TRUSTS OR FOR ENFORCEMENT OF RIGHTS IN SPECIFIC PROPERTY ARE NOT "CLAIMS" WITHIN THE USUAL STATUTES.

THIS PROBLEM HAS BEEN DEALT WITH BY OTHER COURTS, AND WE MAKE REFERENCE TO TWO. IN THE MATTER OF ASHBAUTH V. DAVIS, 71 IDAHO 150, 227 P.2d 954, 32 A.L.R.2d 361 (1951) THE COURT, DEALING WITH A STATUTE SIMILAR TO OUR OWN, SAID:

AS EARLY AS 1886 THIS COURT HELD THAT THE

TERM "CLAIM" DOES NOT INCLUDE CAUSES OF ACTION PURELY EQUITABLE, AND IN WHICH PURELY EQUITABLE RELIEF IS SOUGHT.

SEE ALSO IN RE BAILEY'S ESTATE, 42 CAL. App.2d 509, 109 P.2d 356 (1941).

(4,5) THE TERM "CLAIM" FOUND IN 75-9-4 DOES NOT INCLUDE A CLAIM FOR SPECIFIC PERFORMANCE, BUT REFERS TO DEBTS OR DEMANDS AGAINST THE DECEDENT WHICH MIGHT HAVE BEEN ENFORCED IN HIS LIFETIME, BY PERSONAL ACTIONS FOR THE RECOVERY OF MONEY; AND UPON WHICH ONLY A MONEY JUDGMENT COULD HAVE BEEN RENDERED. HERE, BOTH MRS. THOMPSON AND MRS. POWELL ARE NOT CLAIMING AS CREDITORS, BUT SEEKING SPECIFIC PERFORMANCE OF CONTRACTS TO CONVEY PROPERTY WHICH THEY CLAIM AS THEIR OWN, THUS THEY CANNOT BE CALLED CREDITORS OF THE ESTATE.

(6) THE ASSERTIONS OF APPELLANT THAT THE TRIAL COURT SHOULD HAVE REFUSED TO ENTERTAIN

THE PETITIONS IS NOT WELL MADE. THIS FOR THE REASON THERE IS A COMPLETE STATUTORY PROCEDURE, FOR THE DETERMINATION OF A CLAIM FOR SPECIFIC PERFORMANCE. 75-11-26 THROUGH 75-11-31. UNDER SECTION 75-11-28 THE COURT WAS AUTHORIZED TO ORDER THE ADMINISTRATOR TO EXECUTE A CONVEYANCE.

SECTION 29 OF THAT STATUTE PROVIDES THAT, UPON HEARING, IF THE PETITIONER'S RIGHT TO SPECIFIC PERFORMANCE APPEARS DOUBTFUL, THE COURT MUST DISMISS THE PETITION, WITHOUT PREJUDICE TO THE RIGHTS OF PETITIONER, WHO MAY AT ANY TIME WITHIN SIX MONTHS THEREAFTER PROCEED BY ACTION TO ENFORCE SPECIFIC PERFORMANCE OF THE CONTRACT.

LOUISE BLANCH FILED HER PETITION, PRIOR TO HER DEATH, AND THIS WAS BEFORE THE COURT. APPELLANT FILED A RESPONSE TO THE ADMINISTRATRIX'S PETITION FOR DETERMINATION OF THE CLAIM, WHEREIN APPELLANT CLAIMED SHE WAS AN OWNER OF THE LAND BY GIFT; AND AT THE HEARING SHE ASSERTED THAT

SHE WAS A DEVISEE UNDER LOUISE BLANCH'S HOLOGRAPHIC WILL.

(7) THE INSTRUMENT UNDER WHICH LOUISE BLANCH MADE HER CLAIM IS AS FOLLOWS:

TO WHOM IT MAY CONCERN:

THIS IS TO CERTIFY THAT ON FEBRUARY 17, 1945 I HAVE SOLD TO LOUISE BLANCH FOR THE SUM OF $1.00 (ONE DOLLAR) ALL MY RIGHT AND TITLE TO THE LOT ON WHICH SHE NOW LIVES CONTAINING ABOUT ONE ACRE MORE OR LESS DESCRIBED (SIC) AS FOLLOWS:

LEAVING A RIGHT OF WAY ALONG THE EAST SIDE FOR A DITCH AND A ROAD ABOUT TWENTY FEET WIDE. I ALSO RESERVE THE RIGHT TO CHANGE PIPE ACROSS ROAD SO THAT IT RUNS STRAIGHT WITH SAID DITCH AND ROADWAY. IT IS FURTHER UNDERSTOOD THAT ALL BUILDINGS MOVED ON SAID GROUND BELONG TO RALPH BLANCH AND HIS WIFE AND THAT THEY HAVE BEEN LEASING SAID GROUND FOR THAT PURPOSE.

SIGNED EDWARD SHARP

EDWARD SHARP

SUBSCRIBED AND SWORN BEFORE ME THIS 24 DAY OF NOVEMBER 1945.

LUCY T. ELLISS

(SEAL) NOTARY

THIS INSTRUMENT CONFERRED AN EQUITABLE INTEREST IN THE PROPERTY ON MRS. BLANCH. HER PETITION ASSERTED HER POSSESSION OF THE PROPERTY. THE TESTIMONY OF ETHEL THOMPSON WAS THAT HER FATHER HAD CONVEYED, OR AGREED TO CONVEY, THE SUBJECT PARCEL, WITH THE HOME ON IT, TO LOUISE BLANCH. THE RECORD DOES NOT DISCLOSE DEFEAT OF THIS INSTRUMENT, AND THE GRANTOR COULD NOT, UNILATERALLY, BY HIS OWN FIAT, DO SO.

(8) THE PLEADING FILED BY APPELLANT, IN RESPONSE TO THE ORDER OF THE ADMINISTRATOR SETTING THE HEARING FOR THE DETERMINATION OF APPELLANT'S PETITION, STATES THAT APPELLANT IS THE SUCCESSOR IN INTEREST TO LOUISE BLANCH -- THAT

APPELLANT INHERITED THE SUBJECT PROPERTY FROM HER SISTER. UNDER 75-11-30, EITHER THE ADMINISTRATOR OF THE ESTATE OF LOUISE BLANCH, OR ONE WHO HAS SUCCEEDED TO THE RIGHTS OF LOUISE BLANCH UNDER THE BLANCH CONTRACT TO CONVEY, MAY PARTICIPATE IN A PROCEEDING FOR SPECIFIC PERFORMANCE.

THE CIRCUMSTANCES HERE ARE NOT UNLIKE THOSE FOUND IN WILSON V. FACKREL, 54 IDAHO 515, 34 P. 2d 409 (1934). IN THAT CASE THE PROOF SHOWED A COMPLETE INTER VIVOS GIFT OF REALITY; EVIDENCED BY A WRITING. THE DONEE SOUGHT A DECREE DIRECTING THE ADMINISTRATOR TO EXECUTE A DEED TO THE PROPERTY. ON APPEAL, THE ACTION WAS REMANDED TO TAKE FURTHER EVIDENCE TO DETERMINE IF A GIFT WERE MADE AND ACCEPTED AND IF SO, THE DONEE WAS ENTITLED TO A CONVEYANCE.

(9) A DAUGHTER OF LOUISE BLANCH, AND THE ADMINISTRATRIX OF HER MOTHER'S ESTATE, TESTIFIED THAT SHE KNEW NOTHING ABOUT THE CLAIM HER MOTHER

FILED CONCERNING THE PROPERTY. AS REPRESENTATIVE OF HER MOTHER'S ESTATE, SHE ATTEMPTED (APPARENTLY FOR THE ESTATE) TO DISCLAIM ANY INTEREST IN THE SUBJECT PARCEL. THIS ACTION OF THE ADMINISTRATRIX REQUIRES COMMENT HERE. IT IS CONTRARY TO THE DUTY OF AN ADMINISTRATOR NOT TO TAKE MEASURES TO MARSHALL THE ASSETS OF AN ESTATE. THIS COURT IN IN RE BURT'S ESTATE, 58 UTAH 353, 198 P. 1108 (1921), SO HELD IN CONFORMITY WITH 75-11-3; AND AN ADMINISTRATOR'S DUTY IS SUCCINCTLY SET FORTH IN BANCROFT'S PROBATE PRACTICE, SECOND EDITION.

§349.--DUTY OF REPRESENTATIVE.--ONE OF THE FIRST DUTIES OF AN EXECUTOR OR ADMINISTRATOR IS THAT OF COLLECTING THE ASSETS OF THE ESTATE. NOT ONLY IS IT WITHIN HIS POWER TO COLLECT AND REDUCE TO POSSESSION SUCH ASSETS, BUT HE IS AFFIRMATIVELY REQUIRED IN MOST OF THE STATES TO TAKE INTO HIS POSSESSION ALL THE ESTATE, BOTH

REAL AND PERSONAL, AND TO MAINTAIN AND PRESERVE IT IN AS GOOD CONDITION AS IS REASONABLY POSSIBLE DURING ADMINISTRATION. . . .

(10, 11) FOR AN UNWARRANTED FAILURE TO ACQUIT THIS DUTY AN ADMINISTRATOR IS SUBJECT TO REMOVAL, AND LIABILITY FOR LOSS. THE COURT FOUND THE BLANCH CLAIM TO BE ABANDONED (APPARENTLY ON THE DISCLAIMER OF THE ADMINISTRATRIX), THE APPELLANT'S CLAIM TO THE PROPERTY NOT TO HAVE BEEN PROVED; THAT THE PROPERTY BELONGED TO THE ESTATE OF SHARP; AND BOTH PETITIONS WERE DISALLOWED. THIS WAS ERROR.

AT SUCH A JUNCTURE THE PROPER ACTION OF THE COURT WAS TO DISMISS THE CLAIM, WITHOUT PREJUDICE, THUS ALLOWING THE PETITIONER SIX MONTHS WITHIN WHICH TO FILE AN ACTION FOR SPECIFIC PERFORMANCE; WHICH TIME WOULD COMMENCE TO RUN FROM THE EFFECTIVE DATE OF THE ORDER TO BE MADE BY THE TRIAL COURT, TO THAT EFFECT.

THE JUDGMENT AS IT REFERS TO THE BLANCH PETITION AND THAT OF APPELLANT IS REVERSED AND REMANDED WITH INSTRUCTIONS TO PROCEED IN CONSONANCE WITH THIS OPINION. COSTS ARE AWARDED TO APPELLANT.

CERTIFICATION OF SERVICE

I CERTIFY THAT ON JANUARY 25, 1988, I SERVED 3 COPIES OF THE WITHIN PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ON THE COUNSEL OF RECORD FOR EACH RESPONDENT SHOWN BELOW BY ENCLOSING THE COPIES IN AN ENVELOPE WITH FIRST CLASS POSTAGE PREPAID (PURSUANT TO SUPREME COURT RULE 28.3). THREE COPIES WERE SENT TO EACH OF THE FOLLOWING:

KEITH E. TAYLOR, ESQ.
PARSONS, BEHLE & LATIMER
P. O. BOX 22898
SALT LAKE CITY, UTAH 84143

KENT R. OLSON, ESQ.
1720 SOUTH BELLAIRE STREET
DENVER, COLORADO 80222

CLARON C. SPENCER, ESQ.
310 DESERET BOOK BUILDING
40 E. SOUTH TEMPLE STREET
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S L Browning

STEPHEN L. BROWNING,
PETITIONER

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1329

In the Supreme Court of the United States

October Term, 1987

STEPHEN L. BROWNING,

Petitioner,

v.

CHEVRON U.S.A. INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

KEITH E. TAYLOR
of and for
PARSONS, BEHLE & LATIMER
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, UT 84147-0898
Telephone: (801) 532-1234

Counsel for Respondents

QUESTIONS PRESENTED

May petitioner, Stephen L. Browning, claim error in the proceedings below based upon legal issues and theories that were not clearly presented to the trial court prior to its issuance of summary judgment, and if he may, do those theories require a reversal of the judgment below.

LIST OF PARTIES

The parties to the proceedings below include petitioner, Stephen L. Browning, and the following respondents:

Chevron U.S.A. Inc., a Pennsylvania corporation, formerly known as Gulf Oil Corporation.

Consolidation Coal Company, a Delaware corporation.

The Pittsburgh & Midway Coal Mining Co., a Missouri corporation.

Gulf Mineral Resources Corporation was named as a defendant in the complaint filed in this action, but was never incorporated and existed merely as a former division of Gulf Oil Corporation.

Consolidation Coal Company, a Pennsylvania corporation, was named as a defendant in the complaint filed in this action, but was dissolved prior to the instigation of this lawsuit.

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondents attach hereto as Appendix "A", a list of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each.

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No. 87-1329

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October Term, 1987

STEPHEN L. BROWNING,

Petitioner,

v.

CHEVRON U.S.A. INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Chevron U.S.A. Inc., Consolidation Coal Company and The Pittsburg & Midway Coal Mining Co., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Tenth Circuit in this case.

STATEMENT OF THE CASE

This case is a quiet title action brought by petitioner, Mr. Stephen L. Browning ("Mr. Browning"), in the United States District Court for the District of Utah,

to establish his claim to certain lands referred to in this case as the Coal Rights and Fee Lands, the record title to which was once held by his grandfather, Ira Browning. Chevron U.S.A. Inc. ("Chevron") and Consolidation Coal Company ("Consol") are the successors in title and interest to The Kemmerer Coal Company ("Kemmerer"), for whom Ira Browning worked either as an agent or an employee when the events involved in this case occurred. Chevron is the successor to the Gulf Oil Corporation ("Gulf"), a defendant below, and has succeeded to Kemmerer's interest in the Coal Rights and the Fee Lands. Consol is the lessee of record of both the Coal Rights and the Fee Lands under a lease with Chevron.

Upon the parties' cross motions for summary judgment, the district court granted respondents' motions for summary judgment and denied Mr. Browning's motion for summary judgment in a Memorandum Opinion and Order dated November 27, 1985. Petition, App. at 1A. The district court quieted title to the Coal Rights and Fee Lands in Chevron in a judgment entered June 9, 1986, corrected June 25, 1986, in which the court also denied Mr. Browning's April 11, 1986, Motion for Relief From Judgment. *Id.* at 42A. Mr. Browning was represented by counsel at all stages of the proceedings before the district court, but proceeded *pro se* in his appeal to the United States Court of Appeals for the Tenth Circuit. On appeal, the Tenth Circuit affirmed the district court in an order entered August 28, 1987 and denied Mr. Browning's petition for rehearing in an order entered on October 27, 1987. *Id.* at 49A and 53A.

The facts of this case are fully set forth in the district court's memorandum opinion and order. Rather than restating those facts here, respondents adopt the district court's statement of the facts and incorporate that statement herein by reference.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied, because this case presents none of the "special or important reasons" that would justify a full review by this Court. *See* Sup. Ct. R. 17.1. This case arises under diversity jurisdiction and is based solely on Utah law. It presents no important questions of federal or state law; no issues that will affect parties other than the litigants; no conflict with decisions of other courts; and no other reason for the Court to invoke its power of supervision. Moreover, there is no error in the decisions below for this Court to correct. Those decisions are fully supported by the facts and applicable law.

A comparison of Mr. Browning's petition with the complaint filed in this action and the district court's memorandum opinion reveals that Mr. Browning is now departing from the theories presented to the district court. *See* R. Doc. No. 2, Amended Comp., filed Aug. 23, 1983; and Petition, App. at 1A.

In the district court, Mr. Browning claimed that although Chevron holds record title to the Coal Rights, its title to those lands is subject to an express or constructive trust for his benefit as the intestate successor of his grandfather. Mr. Browning now apparently agrees

with the district court that he failed to meet his burden of proving the existence of such a trust.

Similarly, in the district court Mr. Browning disputed Chevron's and Consol's claim that the Fee Lands are impressed with a purchase money resulting trust for their benefit, because Ira Browning acquired the Fee Lands for the benefit of, and with money provided by, Kemmerer. Mr. Browning also argued that if such a resulting trust existed, it had been repudiated and that laches now bars its enforcement. Mr. Browning apparently now agrees with the district court that the evidence does support the conclusion that the Fee Lands were impressed with such a trust and that there is no evidence to suggest that a repudiation of that trust occurred. Similarly, he apparently does not dispute the district court's conclusion that in the absence of a repudiation, laches does not bar the enforcement of a purchase money resulting trust.

It now appears that Mr. Browning rests his claim to both the Coal Rights and the Fee Lands on the theory that his grandfather held title to both of those properties as a purchase money resulting trustee for the benefit of Kemmerer. Mr. Browning then argues that when Ira Browning died the legal title to both the Coal Rights and the Fee Lands descended to his wife and son, May and Lee Browning, who by operation of law took title not as resulting trustees, but rather as constructive trustees. Although as he now appears to admit no repudiation of that trust occurred, Mr. Browning argues that Chevron and Consol are barred from enforcing the constructive

trust because, unlike beneficiaries under express or resulting trusts, the beneficiary of a constructive trust may be barred by laches even in the absence of a repudiation. Mr. Browning's new-found theory comes too late, and neither the facts nor the law supports the theory.

In the district court, Mr. Browning's attorneys filed eight substantive memoranda comprising over 130 pages of argument in support of, and opposition to, the parties' motions for summary judgment. *See* R. Doc. Nos. 59, 66(b), 67(b), 71, 77, 78, 84 and 94. Except for several brief references that might be construed as suggesting portions of Mr. Browning's new theory, Mr. Browning's arguments in the district court were devoted to the arguments outlined in that court's memorandum opinion. *See* R. Doc. No. 66(b), Pl's First Suppl. Resp., filed Oct. 17, 1984, at 31-32; R. Doc. No. 94, Pl's Resp. and Oppo., filed Oct. 15, 1985, at p. 8; and R. Doc. No. 13, Tr. of Hearing, dated December 14, 1984, at pp. 5-6. Mr. Browning's new theory, which contradicts the theories presented in the district court, was explained for the first time in his April 11, 1986, Motion for Relief from Judgment. Not surprisingly, the court's memorandum opinion does not address those theories.

Mr. Browning's new arguments come too late. As appellate courts have observed on numerous occasions, "[w]e are disinclined to consider those matters which were not presented to the trial court for its consideration and are raised for the first time either after trial or on appeal to this court." *Baker v. Penn Mutual Life Insurance Co.*, 788 F.2d 650, 663 (10th Cir. 1986) (cita-

tions omitted). Mr. Browning should not be allowed to base any claim of error on issues that were not pressed in the summary judgment proceedings and were raised and explained for the first time in a motion for relief from judgment. *See, e.g., American Meat Institute v. Pridgeon,* 724 F.2d 45, 47 (6th Cir. 1984) (issues raised for the first time in a motion for reconsideration are untimely, waived and serve no basis to assign error on appeal); and *Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama,* 676 F.2d 162, 163 (5th Cir. 1982) (theory not clearly presented to trial court may not be relied upon on appeal).

In any event, the facts will not support Mr. Browning's new theories. His claim that the Coal Rights were subject to a purchase money resulting trust for the benefit of Kemmerer is based on an assertion that Kemmerer provided the purchase price for those lands, an assertion that Mr. Browning denied below. Mr. Browning now believes that the minutes of an April 30, 1908, meeting of Kemmerer's Board of Trustees, which discuss Ira Browning's purchase of certain lands for the benefit of Kemmerer, support his new assertion. R. Doc. 47, Affidavit of O. F. Lorenzi, filed July 31, 1984, attachment. However, Mr. Browning fails to note that the description of the land referred to in those minutes does not match the description of the Coal Rights. Accordingly, the discussion contained in the minutes cannot be viewed as referring to the Coal Rights or establishing that Kemmerer provided the purchase price for those lands. None of the parties was able to establish who paid the purchase price for the acquisition of the Coal Rights. Peti-

tion, App. at 25A-26A. Without such evidence, there is no basis for the imposition of a purchase money resulting trust.

In addition, Mr. Browning's argument that May and Lee Browning succeeded to an interest in the Coal Rights upon the death of Ira Browning is without merit. Prior to his death, Ira Browning conveyed all of his interest in the Coal Rights to P. J. Quealy, Kemmerer's predecessor. *Id.* at 5A. Although the three quitclaim deeds evidencing that conveyance were not recorded until 1949, they were effective as between the parties and all claiming under them, except bona fide purchasers who recorded prior to 1949. *E.g., Gregerson v. Jensen,* 669 P.2d 396, 398 (Utah 1983). May and Lee Browning, whose purported rights were derived by intestate succession, were not bona fide purchasers. Accordingly, Mr. Browning, their successor by intestate succession, cannot take advantage of the delay in recording. The conveyances to P. J. Quealy and subsequent conveyances to Kemmerer terminated any resulting trust that may have affected the Coal Rights, and that trust need not be enforced in this lawsuit. 5 A. W. Scott, *The Law of Trusts* § 410, at p. 3226 (3d ed. 1967).

Even if the facts would otherwise support Mr. Browning's new argument, his claim to the Coal Rights and Fee Lands must still be supported by evidence that laches precludes enforcement of the trust. Implicit in Mr. Browning's new theory is an acknowledgement that no evidence of a repudiation exists. Mr. Browning, however, fails to note that he was unable to produce suf-

ficient evidence of any harm arising out of the delay in enforcement of the trust to support a finding of laches. Petition, App. at 39A-40A.

Mr. Browning's new theory finds no support in the law. The assertion that Ira Browning's death converted the purchase money resulting trust affecting the Coal Rights and the Fee Lands into a constructive trust is based upon a common law rule that applies exclusively to express, not resulting, trusts. Scott in his treatise on trusts explains that at common law when an express trustee died intestate, real property held by him in trust passed to his heir who "held it not as *express* trustees but as constructive trustees." II A. W. Scott, *The Law of Trusts* § 104, at p. 90 (4th ed. 1987) (emphasis added). No similar rule is discussed in Chapter 12 of the treatise, which deals with resulting trusts, because as Scott explains, the reason for the rule is unique to express trusts. The heir of an express trustee was not selected by the settlor. Accordingly, he should not be allowed to administer the trust. Thus, the rule developed that although the heir held title to the property, he did so as a constructive trustee pending appointment of a new express trustee by a court. *Id.* Obviously, neither the rule nor the reason for the rule applies to a purchase money resulting trustee, who does not administer a trust and has no duties other than to convey the property to the beneficiary. When such a trust comes before a court, no successor trustee is appointed, the court simply requires the heir to convey the property. *Cf. In re Estate of Hock*, 655 P.2d 1111 (Utah 1982) (trustee's estate held trust property as resulting, not constructive, trustee).

In addition, Utah law does not support Mr. Browning's assertion that, even in the absence of a repudiation, enforcement of all constructive trusts may be barred by the doctrine of laches. This rule only applies to constructive trusts that arise when a trustee holds property adversely to the beneficiary, such as where a trust is based upon fraud. In those circumstances, the beneficiary must commence his lawsuit promptly upon discovering the fraud. However, where the beneficiary of a constructive trust "has no reason to believe that the constructive trustee is holding the property adversely, the beneficiary will not be barred by laches even though he knows of the circumstances giving rise to the constructive trust." 5 A. W. Scott, *The Law of Trusts* § 481.1, at p. 3465 and n. 4 (3d ed. 1967 & Supp. 1987), *citing, Carnesecca v. Carnesecca,* 572 P.2d 708 (Utah 1977).

Mr. Browning appears to rely upon sections 409 and 481.1 of Scott on *The Law of Trusts* for the assertion that constructive trusts are presumed to be adversarial. Scott does not support that proposition. Instead, the treatise merely observes that constructive trusts are "ordinarily" based upon an adversarial relationship. *Id.* at 3464. The facts and circumstances giving rise to the trust must be examined in each instance to determine whether an adversarial relationship exists. A purchase money resulting trust, like some constructive trusts, is based upon a fiduciary relationship. 5 Scott, *supra,* § 409, 3225-26. Even if the death of a resulting trustee could convert the trust into a constructive trust, it does not convert a fiduciary relationship into an adversarial relationship. Only a repudiation accomplishes that re-

sult. For example, in *Carnesecca* the original trustee under a constructive trust died and his wife inherited legal title to the trust property. However, the death of the original trustee in *Carnesecca* was wholly irrelevant to the Utah court's consideration of whether the statute of limitations had run against the beneficiary. The court simply noted that neither the original trustee nor his wife had repudiated the trust and, consequently, the statute had not commenced to run. 572 P.2d at 711. Similarly, absent a showing of repudiation, Chevron and Consol are not barred by laches from enforcing any trust affecting the Coal Rights or the Fee Lands.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

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